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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91179090
Party	Plaintiff Elgo, Inc.
Correspondence Address	Cynthia R. Moore 794 Los Robles Avenue Palo Alto, CA 94306 UNITED STATES moore@moorepatents.com
Submission	Motion for Summary Judgment
Filer's Name	Cynthia R. Moore
Filer's e-mail	moore@moorepatents.com
Signature	/Cynthia R. Moore/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/090,694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

OPPOSITION NO.: 91179090

OPPOSER

vs.

SIMPLYWELL, LLC,

APPLICANT

OPPOSER’S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT
AND
MOTION FOR SUSPENSION OF PROCEEDINGS

Opposer, Elgo, Inc., moves the Trademark Trial and Appeals Board (“the Board”) for Summary Judgment in this Proceeding. Opposer’s Motion for Summary Judgment is supported by the following brief and is based upon the Opposer’s Statement of Uncontroverted Facts.

Opposer further moves the Board to suspend this proceeding pending the Board’s decision on this Motion for Summary Judgment.

I. Opposer's Statement of Uncontroverted Material Facts

Applicant's Service Mark

1. Applicant SimplyWell, Inc. is the owner of U.S. Trademark Application No. 77/090,694 for the service mark SIMPLYQUIT file under Section 1(b) on January 25, 2007, International Class 044, for "counseling in the field of smoking cessation." (Exhibit 1, Applicant's Application file)

2. Applicant filed an Amendment to Allege Use in Commerce on February 7, 2007 with a date of first use September 00, 2006, and a date of first use in commerce of September 00, 2006. (Exhibit 1, Applicant's Application file)

3. A notice of publication for Application No. 77/090,694 was issued on August 7, 2007. (Exhibit 1, Applicant's Application file)

4. The present Opposition to Application No. 77/090,694 was filed on August 22, 2007.

5. The Specimen in support of Use in Commerce submitted for Application No. 77/090,694 is described as a brochure displaying the mark. The brochure purports to describe Applicants eight-step smoking cessation program for smokers, and is clearly directed at individual smokers (e.g., "Initial contact when you are assigned your personal quit coach," "Here is how your health can improve after your last cigarette." (Exhibit 1, Applicant's Application file)

Opposer's Prior Use of the Mark SIMPLYQUIT

6. Opposer Elgo, Inc. was incorporated on August 25, 2000 with the purpose of manufacturing and selling products to aid in smoking cessation. (Exhibit 2, Affidavit of Sam Gold, and Exhibit A thereto)

7. Opposer received a sales permit on January 1, 2001 to begin sales of its smoking cessation product using the mark SIMPLYQUIT and has been engaged continuously in sales of

smoking cessation products to the present time using the mark. (Exhibit 2, Affidavit of Sam Gold, and Exhibit B thereto)

8. Opposer established a website whose address is www.simplyquit.com in January 2001, long before Applicant first began using the name SIMPLYQUIT and before Applicant filed its intent-to-use trademark application. Opposer is and has been engaged in commerce using the [simplyquit.com](http://www.simplyquit.com) website and the mark to sell products useful for smoking cessation. (Exhibit 2, Affidavit of Sam Gold, and Exhibit C thereto)

9. Opposer has used the mark SIMPLYQUIT in commerce continuously from September 21, 2001 to the present. (Exhibit 2, Affidavit of Sam Gold; and Exhibit 3, Opposer's Response to Applicant's Document Requests Nos. 15, 16, 21)

10. Opposer has invested considerable funds to advertise its smoking cessation products using the trademark SIMPLYQUIT nationally, **including in Applicant's home city and state**, using the internet, print media, radio and television. In particular, Opposer advertised SIMPLYQUIT simulated cigarettes and the *SIMPLYQUIT Step-by-Step Stop Smoking Guide* with the following national media companies: Stardust Media LCC, Central Point Media, TV sales Pros.LCC, PSST, and on the following nation-wide TV stations: Comedy Central, Family Net, Great American Country, WBIH-TV, WYBE-LP, WCTV, KBTB, UATV, KFWD, WKAG, WYB33, KETK, CNTV, KMIR TV, TVHH. A copy of the TV commercial spot is available on the websites www.CrewClean.com and www.simplyquit.com. Opposer advertised SIMPLYQUIT simulated cigarettes and the *SIMPLYQUIT Step-by-Step Stop Smoking Guide* on the following radio stations: KQQU (Omaha, Nebraska Radio Station), KNIK, Talk Radio and others. A copy of the radio commercial is posted on the website www.CrewClean.com and www.simplyquit.com. Opposer advertised SIMPLYQUIT simulated cigarettes and the

SIMPLYQUIT *Step-by-Step Stop Smoking Guide* with the following national newspapers and magazines: *Globe*, *The National Enquirer*, *Star*, *Outdoor Life*, *Prevention*, *Inventors Digest*, *Golf*, *Entertainment Today*, *Times Mirror*, *Mystery*, *Autoworld News*, *PennySaver*, *Acorn*, *Alaska Bush Shopper*. (Exhibit 2, Affidavit of Sam Gold; and Exhibit 3, Opposer's Response to Applicant's Document Request No. 7)

11. Prior to the filing date of Applicant's trademark application, Opposer had invested substantial sums in advertising to generate consumer awareness of its smoking cessation products and good will toward its business, had invested substantial sums of money to manufacture smoking cessation products as well as packaging materials identifying the products by the trademark SIMPLYQUIT, had invested substantial sums of money to obtain and maintain a patent on Opposer's products for smoking cessation, and had sold thousands of units of SIMPLYQUIT simulated cigarettes and generated sales of hundreds of thousands of dollars. (Exhibit 2, Affidavit of Sam Gold; Exhibit 4, U.S. Patent No. 6,606,998 to Ely Gold)

12. Opposer has generated consumer awareness and goodwill for its smoking cessation products by virtue of their successful use as an aid to achieving smoking cessation and by virtue of Opposer's reliability and the availability of its products. An article in *The Acorn* featured Ely Gold and his simulated cigarette, published on February 14, 2002. (Exhibit 5) Whoopi Goldberg hosted an episode of ABC's "The View" on Monday Oct 29, 2007, in which smoking cessation methods were discussed, including the use of SIMPLYQUIT simulated cigarettes. (Exhibit 6) (*See also* Exhibit 2, Affidavit of Sam Gold; Exhibit 3, Opposer's Response to Applicant's Document Requests No. 21; and Exhibit 7, Affidavit of Cynthia Moore)

13. Opposer markets its products to individuals seeking assistance with efforts to quit smoking, as well as health care personnel, including physicians, pharmacists, nurses and

smoking cessation counselors. (Exhibit 11, Opposer's Answers to Interrogatories)

14. Opposer's simplyquit.com website was established in January 2001 (see fact No. 8 above) and has been actively managed since at least October 2001. Records available at the Wayback Machine show 123 snapshots taken between October 16, 2001 and August 29, 2007, with updates noted on 16 dates: October 16, 2001, October 31, 2001, December 4, 2001, June 6, 2002, June 8, 2002, August 6, 2002, September 23, 2002, November 23, 2002, December 1, 2002, February 9, 2003, July 18, 2003, August 4, 2003, February 3, 2006, July 1, 2006, May 29, 2007 and July 2, 2007, indicating active management of the website throughout the time period. (Exhibit 7, Affidavit of Cynthia Moore; Exhibit 8, printouts from the Wayback Machine)

15. The archived web pages demonstrate the continuous use of the domain name simplyquit.com, the simplyquit.com website, and the mark SIMPLYQUIT in the sale and marketing of Opposer's simulated cigarettes and smoking cessation program and guide. They also demonstrate developing advertising activity: first website in 2001, sample TV commercials in 2002, sample radio commercial in 2003. Additional language pages were added over time as well starting with English in 2001, Spanish in 2002, and Russian in 2003. (Exhibit 8, printouts from the Wayback Machine)

16. Starting in 2001, a "Step-by-Step Stop Smoking Program" was offered by Opposer in addition to a simulated cigarette, both offered under the SIMPLYQUIT mark and also bundled as a "SIMPLYQUIT Step 1 Kit." (Exhibit 8, printouts from the Wayback Machine)

17. Opposer has used the mark SIMPLYQUIT in commerce continuously from September 21, 2001 to the present, with sales throughout the U.S. and internationally. (Exhibit 2, Affidavit of Sam Gold; Exhibit 7, Affidavit of Cynthia Moore; Exhibit 8, printouts from the Wayback

Machine; and Exhibit 3, Opposer's Response to Applicant's Document Requests Nos. 15, 16, 21)

18. Opposer's mark has acquired distinctiveness and consumer awareness by virtue of Opposer's substantial and continuous use of the mark in commerce for more than 5 years.

Comparisons between Applicant's Mark and Opposer's Mark

19. Applicant's mark SIMPLYQUIT is identical to Opposer's mark SIMPLYQUIT.
(*Compare* specimens in Exhibit 1, Applicant's Application file, and in Exhibit 9, Opposer's Application file)

20. Applicant's mark "SimplyQuit" is identical to Opposer's mark "SimplyQuit" as to appearance. (*Compare* specimens in Exhibit 1, Applicant's Application file, and in Exhibit 9, Opposer's Application file)

21. Opposer has used the mark both as a single word: "SimplyQuit" and as two words "Simply Quit" in both serifed and unserifed fonts. (sample web pages in Exhibit 8, printouts from the Wayback Machine, specimen from Exhibit 9, Opposer's Application file)

22. Applicant's mark SIMPLYQUIT is identical to Opposer's mark SIMPLYQUIT as to sound (pronunciation). (*Compare* specimens in Exhibit 1, Applicant's Application file, and in Exhibit 9, Opposer's Application file)

23. Applicant's mark SIMPLYQUIT is identical to Opposer's mark SIMPLYQUIT as to connotation. (*Compare* specimens in Exhibit 1, Applicant's Application file, and in Exhibit 9, Opposer's Application file)

24. Applicant's mark SIMPLYQUIT is identical to Opposer's mark SIMPLYQUIT as to commercial impression. (*Compare* specimens in Exhibit 1, Applicant's Application file, and in Exhibit 9, Opposer's Application file)

25. Both Applicant's mark SIMPLYQUIT and Opposer's mark SIMPLYQUIT are used in the area of smoking cessation. (*Compare* specimens and areas of use in Exhibit 1, Applicant's Application file, and in Exhibit 9, Opposer's Application file)

Opposer's Trademark Application

26. Opposer is the owner of U.S. Trademark Application No. 78/085,086 for the trademark SIMPLYQUIT, filed under Section 1(a) on September 22, 2001, for "smoker's articles, namely simulated cigarette." (Exhibit 9, Opposer's Application File)

27. Opposer's first use of the mark SIMPLYQUIT was recorded as September 15, 2001, and the first use in commerce was recorded as September 21, 2001. (Exhibit 9, Opposer's Application File)

28. Opposer received an Office Action dated December 03, 2001, which was misfiled. Opposer then received a Notice of Abandonment dated August 19, 2002 regarding Application No. 78/085,086. (Exhibit 9, Opposer's Application File)

29. Opposer filed a timely Petition to Revive on August 26, 2002 with the required response.

30. In that response, Opposer amended the identification of goods at the Examiner's suggestion to "smoker's articles, namely cigarettes containing tobacco substitutes not for medical purposes IC034" and submitted a specimen. (Exhibit 9, Opposer's Application File)

31. The Office failed to act on the Petition to Revive or to continue examination of Opposer's application, though the papers were stamped as received, the check deposited and the documents posted on the trademark document retrieval site. (Exhibit 9, Opposer's Application File)

32. Opposer filed a Request for Reinstatement Due to Office Error on July 16, 2007. (Exhibit 9, Opposer's Application File)

33. The Office issued a notice of “Petition to Revive Denied” on August 31, 2007. (Exhibit 9, Opposer’s Application File)
34. Opposer filed a Request for Reconsideration on October 3, 2007. (Exhibit 9, Opposer’s Application File)
35. Action on the Request for Reconsideration is pending.

II. RELEVANT LEGAL STANDARDS

A. Summary Judgment Standard

On a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. A genuine dispute with respect to a material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any particular factual issues are genuinely in dispute must be resolved in the light most favorable to the non-moving party. *See Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

B. Standing

Any person who believes it is or will be damaged by registration of a mark has standing to file a complaint. (TBMP § 303, 309.03(b))

C. Damage

A real interest in the proceedings and a reasonable belief of damage may be found, for example, where a plaintiff pleads (and later proves): [a] claim of likelihood of confusion that is not wholly without merit (TBMP § 309.03(b)).

D. Priority of Use

To establish priority, opposer must show proprietary rights in the mark that will suffer a likelihood of confusion. These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights. (*Herbko Intl., Inc. v. Kappa Books, Inc.*, 308F.3d 1156, 1162, 64 USPQ2d 137S, 1378 (Fed. Cir. 2002))

E. Likelihood of Confusion

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it ...
(d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake or to deceive... (15 U.S.C. § 1052 [Section 2(d) of Lanham Act]; TMEP § 1207)

III. ARGUMENT

A. Summary Judgment Standard

Opposer will show that as a matter of law and based on the uncontroverted facts presented in Section I of this brief, that Applicant's mark should be refused registration, because Opposer has established prior and continuous use of the same mark, and there is substantial likelihood of confusion between Applicant's use of the mark and Opposer's use of the same mark.

B. Standing

Opposer has standing, because Opposer believes it is or will be damaged by registration of the mark SIMPLYQUIT to Applicant which Opposer has been using in commerce continuously since 2001.

C. Damages

A *prima facie* case of likelihood of confusion exists, because the marks of Opposer and Applicant are identical and both are used in the area of smoking cessation. Thus, there is clearly a claim of likelihood of confusion that is not wholly without merit as required by TBMP § 309.03(b).

D. Priority of Use

Opposer has shown (Section I above) that it began continuous and substantial use of the mark SIMPLYQUIT on September 15, 2001. Applicant's use of the mark began in September of 2006, some five years later. Opposer has clear priority of use.

E. Likelihood of Confusion

The determination of whether likelihood of confusion exists is made by evaluation and balancing of the pertinent *du Pont* factors: (1) The similarity or dissimilarity of the marks in their entireties as to the appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and the nature of the goods or services as described in an application or registration in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made; (5) the fame of the prior mark; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there has been concurrent use without evidence of actual

confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion; i.e., whether *de minimus* or substantial; and (13) any other facts probative of the effect of use. (*In re E.I. du Pont de Nemours*, 476 F.2d 1357, 177 (CCPA 1973)) Opposer's arguments in the instant Opposition will relate primarily to factors numbered 1, 2, 3, 4, and 12.

With regard to factor 1, "the similarity or dissimilarity of the marks in their entireties as to the appearance, sound, connotation and commercial impression," there is likelihood of confusion because the marks are **identical**. Applicant's SIMPLYQUIT mark is **identical** to Opposer's SIMPLYQUIT mark in appearance, sound, connotation and commercial impression. In the case of identical marks, the Trademark Trial and Appeal Board has found that the relationship between the goods or services need not be as close to support a finding of likelihood of confusion as would be required in a case where there are differences between the marks. (*Amcort, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981)) Thus, there is no genuine issue of material fact with regard to the similarity or dissimilarity of the marks in their entireties as to the appearance, sound, connotation and commercial impression.

With regard to factor 2, "the similarity or dissimilarity and the nature of the goods or services as described in an application or registration in connection with which a prior mark is in use," Applicant's mark is a service mark in International Class 044 for "counseling in the field of smoking cessation," and Opposer uses his mark for marketing a simulated cigarette and its *Step-by-Step Stop Smoking Guide* and program as aids to smoking cessation. Although Applicant's mark is a service mark and Opposer's mark is a trademark, it is well recognized that **confusion is likely to occur from the use of the same or similar marks for goods, on the one hand, and**

for services involving those goods, on the other. *See, e.g., In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (BIGG’S (stylized) for retail grocery and general merchandise store services held likely to be confused with BIGGS and design for furniture); *In re H.J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347 (C.C.P.A. 1961) (SEILER for catering services held likely to be confused with SEILER’S for smoked and cured meats); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE (stylized) for retail women’s clothing store services and clothing held likely to be confused with CREST CAREER IMAGES (stylized) for uniforms); *In re United Service Distributors, Inc.*, 229 USPQ 237 (TTAB 1986) (design for distributorship services in the field of health and beauty aids held likely to be confused with design for skin cream); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB for various items of men’s, boys’, girls’ and women’s clothing held likely to be confused with THE “21” CLUB (stylized) for restaurant services and towels); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (STEELCARE INC. for refinishing of furniture, office furniture, and machinery held likely to be confused with STEELCASE for office furniture and accessories); *Corinthian Broadcasting Corporation v. Nippon Electric Co., Ltd.*, 219 USPQ 733 (TTAB 1983) (TVS for transmitters and receivers of still television pictures held likely to be confused with TVS for television broadcasting services); *In re Industrial Expositions, Inc.*, 194 USPQ 456 (TTAB 1977) (POLLUTION ENGINEERING EXPOSITION for programming and conducting of industrial trade shows held likely to be confused with POLLUTION ENGINEERING for a periodical magazine).

There is clear potential for confusion between a service mark for counseling services in the field of smoking cessation and a trademark using the identical word for a product to aid in smoking cessation. “The issue is not whether the actual goods [or services] are likely to be

confused but, rather, whether there is a likelihood of confusion as to the *source* of the goods.” TMEP § 1207.01 (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993), and cases cited therein). Both the service and the product may be used for the same purpose. Both are targeted at smokers who are trying to quit, as well as health care providers for the benefit of their patients. Potential consumers would reasonably expect that a smoking cessation service provider might offer products related to smoking cessation, and that a seller of smoking cessation products might offer smoking cessation counseling services. Thus, consumers could easily be confused as to the source of the goods or services.

Thus, as a matter of law, there is considerable likelihood of confusion between Applicant’s service mark for counseling services for smoking cessation and Opposer’s prior and continuing use of the mark on products for use in smoking cessation. There is no genuine issue of material fact with regard to whether the goods and services are not related.

With regard to factor 3, “the similarity or dissimilarity of established, likely-to-continue trade channels,” Applicant’s trade channels, as far as they can be inferred from Applicant’s Application, are the same as those of Opposer. Both Applicant, in its Application, and Opposer, in its prior use of the mark, market goods and/or services to persons seeking to quit smoking or to health care providers who assist others in quitting smoking. Applicant has tried to assert the use of different trade channels. In Applicant’s Answers to Interrogatories (Exhibit 10), Applicant asserts that the counseling services are not marketed to the general public; rather they are offered through member employer subscribers. (Answer to Interrogatory No. 8) Applicant further asserts that Applicant’s services are offered to corporations in connection with SimplyWell’s Integrated Health Solutions and are marketed directly through sales representatives or account managers on a nationwide basis. (Answer to Interrogatory No. 12)

Applicant also states that it maintains promotional materials that describe the SIMPLYQUIT eight step smoking cessation program. (Answer to Interrogatory No. 11)

However, an **Applicant may not restrict the scope of its customer base or channel of trade in contradiction to that identified in the Application by extrinsic argument or evidence as to their preferred customers or channels of trade.** *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Here, Applicant's assertions that Applicant does not market directly to consumers **are not relevant**, because the **determination of likelihood of confusion must be made on the basis of the goods or services recited in the application.** *See, for example, Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Uncle Sam Chemical Co., Inc.*, 229 USPQ 233 (TTAB 1986) (SPRAYZON for cleaning preparations and degreasers for industrial and institutional use held likely to be confused with SPRA-ON and design for preparation for cleaning woodwork and furniture). Applicant's application recites only "counseling services in the field of smoking cessation" without reciting a particular target customer base or limiting Applicant's marketing in any way that would avoid confusion, nor would such avoidance be possible. The specimen provided in Applicant's application shows the mark used in a brochure that is clearly targeted at individual smokers, which are some of the same customers that are targeted by Opposer's marketing (e.g., "Initial contact when you are assigned your personal quit coach," "Here is how your health can improve after your last cigarette." (Exhibit 1, Applicant's Application file). No mention of corporate customers or "member employer subscribers" appears anywhere in Applicant's application, nor is Applicant's mark associated with any marketing materials intended for use only with corporate managers or subscribers. Rather, Applicant's use of the mark is directed toward individual smokers, as evinced in their own application file.

Therefore, the established, likely-to-continue trade channels are similar, and there is no genuine issue of material fact with regard to the similarity or dissimilarity of established, likely-to-continue trade channels.

With regard to factor 4, “the conditions under which and buyers to whom sales are made,” the buyers of Applicant’s services as represented in its application and the buyers of Opposer’s goods and services are the same, and there is no difference in the conditions under which such buyers make purchase decisions. Any argument that Applicant’s corporate customers might be more careful and sophisticated purchasers is not relevant, because the application does not limit Applicant’s customer base to such specialized customers or to specialized or expensive versions of their counseling service. Further, even if Applicant’s corporate customers are considered to be sophisticated and knowledgeable, this does not necessarily mean that they are immune from source confusion. *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

Further, for there to be any likelihood of confusion, some “relevant person” must be likely to encounter both marks and subsequently be confused as to the source of the goods or services. The inquiry is as to whether there is a particular person who would encounter both marks and become confused. *In re Digirad*, 45 USPQ2d 1841, 1844 (TTAB 1998), *Electronic Design and Sales, Inc. v. Electronic Data Systems Corp.*, 21USPQ2d 1388 (Fed. Cir. 1992). In the instant situation, employer subscribers to Applicant’s counseling services might very well want to include a smoking cessation aid such as Opposer’s simulated cigarette in their programs, and in view of the identical marks, be confused as to the source of the goods and services. Any employees of such corporate subscribers utilizing Applicant’s smoking cessation services marketed using Applicant’s mark would be confused as to whether Opposer’s goods were

available and also marketed by Applicant. Thus, there is no genuine issue of material fact regarding the customers of Applicant and Opposer or conditions under which and buyers to whom sales are made.

With regard to factor 12, “the extent of potential confusion; i.e., whether *de minimus* or substantial,” there would be substantial confusion between use of Applicant’s mark and Opposer’s prior use of the mark because (1) the marks are identical, (2) the use of the products and services serve the same goal (smoking cessation), (3) the customers are the same (people who are trying to quit smoking, or assisting others to quit smoking, including health care providers as well as individuals), and (4) there are no geographic restrictions of record in the use of the mark by either party. There is no genuine issue of material fact regarding whether the possible confusion is substantial.

In addition to the *du Pont* factors, there are several other issues that are important to likelihood of confusion. First, the Expansion of Trade Doctrine states that a trademark owner is entitled to protection against the registration of a similar mark on products that might reasonably be expected to be produced by him in the normal expansion of his business. The test is whether purchasers would believe the product or service is within the registrant’s logical zone of expansion. *CPG Products Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983). Counseling services in the area of smoking cessation are a very obvious potential area of expansion for Opposer which already offers its *Step-by-Step Stop Smoking Guide* for self-help counseling, and could easily expand into counseling services of the sort offered by Applicant. To the extent that Opposer already offers a program for quitting smoking, Opposer would be damaged by registration of Opposer’s mark to Applicant.

Applicant probed Opposer in its Interrogatories as to whether Opposer was aware of any actual confusion that has occurred to date between Applicant's mark and Opposer's mark. It is well settled that the relevant test is *likelihood of confusion*, not actual confusion. It is unnecessary to show actual confusion to establish likelihood of confusion. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), and cases cited therein.

Applicant's Application is in International Class 044, while Opposer has a related Application in International Class 034. However, the classification of goods and services has no bearing on the question of likelihood of confusion. Rather, it is the manner in which the applicant and/or registrant have identified their goods or services that is controlling. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); *National Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1216 n.5 (TTAB 1990). The likelihood of confusion based on the manner in which Applicant and Opposer have identified their goods and services has been discussed above, and there is no issue of material fact regarding the likelihood of confusion.

IV. CONCLUSION

Opposer has established prior and continuous use of the same mark as a matter of fact. Opposer has also shown that there is substantial likelihood of confusion between Applicant's use of the mark and Opposer's use of the same mark.

Thus, as a matter of law and based on the uncontroverted facts presented in Section I of this brief, Applicant's mark should be refused registration.

Opposer also notes that the need for this Opposition proceeding was occasioned by a combination of Office errors and delays. The Office failed to act on Opposer's Petition to

Revive for its Application for the subject mark. The Examiner for the Application for the same mark by the Applicant then looked no further than the apparent abandonment of Opposer's Application to conclude that Opposer was no longer using its mark and allowing Applicant's mark to be published for registration. Opposer was then forced to file this Opposition to protect its rights while seeking to reinstate its own Application. The Office further delayed in reinstating the Application for at least nine months, despite repeated verbal statements by an Office representative to the undersigned attorney that it intended to do so and that it intended to remand the Applicant's Application to the Examiner for reexamination in light of the prior and continuing use by Opposer. This Opposition is thus entirely the result of the Office's errors and delays in action. The continued inaction of the Office that has now brought Opposer to the brink of its testimony period has necessitated the timing of this Motion for Summary Judgment. Opposer respectfully submits that a granting of this Motion for Summary Judgment in favor of the Opposer is now the most economical resolution of this unfortunate series of events for all parties, and therefore prays that the Motion for Summary Judgment be granted and that Applicant's mark be denied registration.

Respectfully submitted,

ELGO, INC., Opposer

Dated this 7th day of May, 2008

By: /Cynthia R. Moore/
Cynthia R. Moore
794 Los Robles Ave.
Palo Alto, CA 94306
(650) 565-8185 (office)
(650) 493-1993 (fax)
ATTORNEY FOR OPPOSER

CERTIFICATE OF ESTTA FILING

The undersigned hereby certify that a copy of the foregoing papers and all exhibits thereto was filed electronically with the Trademark Trial and Appeal Board via the ESTTA on the 7th day of May, 2008.

/Cynthia R. Moore/
Cynthia R. Moore
794 Los Robles Ave.
Palo Alto, CA 94306
(650) 565-8185 (office)
(650) 493-1993 (fax)
ATTORNEY FOR OPPOSER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing papers and all exhibits thereto was served on Christopher Bikus, the attorney for Applicant SimplyWell, LLC, by first class mail postage prepaid this 7th day of May 2008, addressed as follows:

McGRATH NORTH MULLIN & KRATZ, PC LLO
Suite 3700, First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Attention: Christopher M. Bikus, Esq.

/Cynthia R. Moore/
Cynthia R. Moore
Attorney for Opposer

Exhibit 1

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

Side - 1



NOTICE OF PUBLICATION UNDER §12(a)
MAILING DATE: Jul 18, 2007
PUBLICATION DATE: Aug 7, 2007

The mark identified below will be published in the Official Gazette on Aug 7, 2007. Any party who believes they will be damaged by registration of the mark may oppose its registration by filing an opposition to registration or a request to extend the time to oppose within thirty (30) days from the publication date on this notice. If no opposition is filed within the time specified by law, the USPTO may issue a Certificate of Registration.

To view the Official Gazette online or to order a paper copy, visit the USPTO website at <http://www.uspto.gov/web/trademarks/tmog/> any time within the five-week period after the date of publication. You may also order a printed version from the U.S. Government Printing Office (GPO) at <http://bookstore.gpo.gov> or 202-512-1800. To check the status of your application, go to <http://tarr.uspto.gov/>.

SERIAL NUMBER: 77090694
MARK: SIMPLYQUIT
OWNER: SIMPLYWELL, LLC

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

FIRST-CLASS MAIL
U.S POSTAGE
PAID

CHRISTOPHER M. BIKUS
MCGRATH, NORTH, MULLIN & KRATZ, PC LLO
1601 DODGE ST
OMAHA, NE 68102-1637

Trademark Snap Shot Publication & Issue Review Stylesheet
(Table presents the data on Publication & Issue Review Complete)

OVERVIEW

SERIAL NUMBER	77090694	FILING DATE	01/25/2007
REG NUMBER	0000000	REG DATE	N/A
REGISTER	PRINCIPAL	MARK TYPE	SERVICE MARK
INTL REG #	N/A	INTL REG DATE	N/A
TM ATTORNEY	EULIN, INGRID C	L.O. ASSIGNED	111

PUB INFORMATION

RUN DATE	05/17/2007
PUB DATE	N/A
STATUS	681-PUBLICATION/ISSUE REVIEW COMPLETE
STATUS DATE	05/16/2007
LITERAL MARK ELEMENT	SIMPLYQUIT

DATE ABANDONED	N/A	DATE CANCELLED	N/A
SECTION 2F	NO	SECTION 2F IN PART	NO
SECTION 8	NO	SECTION 8 IN PART	NO
SECTION 15	NO	REPub 12C	N/A
RENEWAL FILED	NO	RENEWAL DATE	N/A
DATE AMEND REG	N/A		

FILING BASIS

FILED BASIS		CURRENT BASIS		AMENDED BASIS	
1 (a)	NO	1 (a)	YES	1 (a)	NO
1 (b)	YES	1 (b)	NO	1 (b)	NO
44D	NO	44D	NO	44D	NO
44E	NO	44E	NO	44E	NO

66A	NO	66A	NO				
NO BASIS	NO	NO BASIS	NO				
MARK DATA							
STANDARD CHARACTER MARK			YES				
LITERAL MARK ELEMENT			SIMPLYQUIT				
MARK DRAWING CODE			4-STANDARD CHARACTER MARK				
COLOR DRAWING FLAG			NO				
CURRENT OWNER INFORMATION							
PARTY TYPE			10-ORIGINAL APPLICANT				
NAME			SIMPLYWELL, LLC				
ADDRESS			4242 Farnam Street, Ste. 270 Omaha, NE 68131				
ENTITY			16-LTD LIAB CO				
CITIZENSHIP			Nebraska				
GOODS AND SERVICES							
INTERNATIONAL CLASS			044				
DESCRIPTION TEXT			Counseling in the field of smoking cessation				
GOODS AND SERVICES CLASSIFICATION							
INTERNATIONAL CLASS	044	FIRST USE DATE	09/00/2006	FIRST USE IN COMMERCE DATE	09/00/2006	CLASS STATUS	6-ACTIVE
MISCELLANEOUS INFORMATION/STATEMENTS							
CHANGE IN REGISTRATION				NO			
PSEUDO MARK				SIMPLY QUIT			

PROSECUTION HISTORY

DATE	ENT CD	ENT TYPE	DESCRIPTION	ENT NUM
05/16/2007	PREV	O	LAW OFFICE PUBLICATION REVIEW COMPLETED	010
05/14/2007	CNSA	O	APPROVED FOR PUB - PRINCIPAL REGISTER	009
05/14/2007	IUAA	P	USE AMENDMENT ACCEPTED	008
05/14/2007	DOCK	D	ASSIGNED TO EXAMINER	007
03/15/2007	AUPC	I	AMENDMENT TO USE PROCESSING COMPLETE	006
02/07/2007	IUAF	S	USE AMENDMENT FILED	005
03/15/2007	ALIE	A	ASSIGNED TO LIE	004
02/07/2007	EAAU	I	TEAS AMENDMENT OF USE RECEIVED	003
01/30/2007	MPMK	O	NOTICE OF PSEUDO MARK MAILED	002
01/29/2007	NWAP	I	NEW APPLICATION ENTERED IN TRAM	001

CURRENT CORRESPONDENCE INFORMATION

ATTORNEY	Christopher M. Bikus
CORRESPONDENCE ADDRESS	CHRISTOPHER M. BIKUS MCGRATH, NORTH, MULLIN & KRATZ, PC LLO 1601 DODGE ST OMAHA, NE 68102-1637
DOMESTIC REPRESENTATIVE	NONE

SIMPLYQUIT

Side - 1



NOTICE OF ACCEPTANCE OF AAU
MAILING DATE: May 15, 2007

The amendment to allege use (AAU) filed for the trademark application identified below has been accepted as meeting the minimum requirements of 37 C.F.R. §2.76(e). The amendment to allege use will be forwarded to the Examining Attorney for a substantive review.

Filing an amendment to allege use does not relieve the applicant of the duty to file a response to any outstanding Office action or to take any other action required in the case, including filing a notice of appeal.

For further information, visit our website at: <http://www.uspto.gov> or call the Trademark Assistance Center at 1-800-786-9199.

SERIAL NUMBER: 77090694
MARK: SIMPLYQUIT
OWNER: SIMPLYWELL, LLC

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

FIRST-CLASS MAIL
U.S POSTAGE
PAID

CHRISTOPHER M. BIKUS
MCGRATH, NORTH, MULLIN & KRATZ, PC LLO
1601 DODGE ST
OMAHA, NE 68102-1637

Trademark Snap Shot Publication Stylesheet
(Table presents the data on Publication Approval)

OVERVIEW

SERIAL NUMBER	77090694	FILING DATE	01/25/2007
REG NUMBER	0000000	REG DATE	N/A
REGISTER	PRINCIPAL	MARK TYPE	SERVICE MARK
INTL REG #	N/A	INTL REG DATE	N/A
TM ATTORNEY	EULIN, INGRID C	L.O. ASSIGNED	111

PUB INFORMATION

RUN DATE	05/15/2007
PUB DATE	N/A
STATUS	680-APPROVED FOR PUBLICATON
STATUS DATE	05/14/2007
LITERAL MARK ELEMENT	SIMPLYQUIT

DATE ABANDONED	N/A	DATE CANCELLED	N/A
SECTION 2F	NO	SECTION 2F IN PART	NO
SECTION 8	NO	SECTION 8 IN PART	NO
SECTION 15	NO	REPub 12C	N/A
RENEWAL FILED	NO	RENEWAL DATE	N/A
DATE AMEND REG	N/A		

FILING BASIS

FILED BASIS		CURRENT BASIS		AMENDED BASIS	
1 (a)	NO	1 (a)	YES	1 (a)	NO
1 (b)	YES	1 (b)	NO	1 (b)	NO
44D	NO	44D	NO	44D	NO
44E	NO	44E	NO	44E	NO

66A	NO	66A	NO				
NO BASIS	NO	NO BASIS	NO				
MARK DATA							
STANDARD CHARACTER MARK			YES				
LITERAL MARK ELEMENT			SIMPLYQUIT				
MARK DRAWING CODE			4-STANDARD CHARACTER MARK				
COLOR DRAWING FLAG			NO				
CURRENT OWNER INFORMATION							
PARTY TYPE			10-ORIGINAL APPLICANT				
NAME			SIMPLYWELL, LLC				
ADDRESS			4242 Farnam Street, Ste. 270 Omaha, NE 68131				
ENTITY			16-LTD LIAB CO				
CITIZENSHIP			Nebraska				
GOODS AND SERVICES							
INTERNATIONAL CLASS			044				
DESCRIPTION TEXT			Counseling in the field of smoking cessation				
GOODS AND SERVICES CLASSIFICATION							
INTERNATIONAL CLASS	044	FIRST USE DATE	09/00/2006	FIRST USE IN COMMERCE DATE	09/00/2006	CLASS STATUS	6-ACTIVE
MISCELLANEOUS INFORMATION/STATEMENTS							
CHANGE IN REGISTRATION				NO			
PSEUDO MARK				SIMPLY QUIT			

PROSECUTION HISTORY

DATE	ENT CD	ENT TYPE	DESCRIPTION	ENT NUM
05/14/2007	CNSA	O	APPROVED FOR PUB - PRINCIPAL REGISTER	009
05/14/2007	IUAA	P	USE AMENDMENT ACCEPTED	008
05/14/2007	DOCK	D	ASSIGNED TO EXAMINER	007
03/15/2007	AUPC	I	AMENDMENT TO USE PROCESSING COMPLETE	006
02/07/2007	IUAF	S	USE AMENDMENT FILED	005
03/15/2007	ALIE	A	ASSIGNED TO LIE	004
02/07/2007	EAAU	I	TEAS AMENDMENT OF USE RECEIVED	003
01/30/2007	MPMK	O	NOTICE OF PSEUDO MARK MAILED	002
01/29/2007	NWAP	I	NEW APPLICATION ENTERED IN TRAM	001

CURRENT CORRESPONDENCE INFORMATION

ATTORNEY	Christopher M. Bikus
CORRESPONDENCE ADDRESS	CHRISTOPHER M. BIKUS MCGRATH, NORTH, MULLIN & KRATZ, PC LLO 1601 DODGE ST OMAHA, NE 68102-1637
DOMESTIC REPRESENTATIVE	NONE

SIMPLYQUIT

Trademark/Service Mark Amendment to Allege Use
(15 U.S.C. Section 1051(c))

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77090694
NOTICE OF ALLOWANCE	NO
EXTENSION OF USE	NO
REQUEST TO DIVIDE	NO
MARK SECTION	
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	SIMPLYQUIT
OWNER SECTION (no change)	
ATTORNEY SECTION (no change)	
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	044
GOODS AND/OR SERVICES	KEEP ALL LISTED
FIRST USE ANYWHERE DATE	09/00/2006
FIRST USE IN COMMERCE DATE	09/00/2006
SPECIMEN FILE NAME(S)	\\TICRS2\EXPORT12\770\906\77090694\xml3\AAU0002.JPG
SPECIMEN DESCRIPTION	copy of a brochure displaying the mark
PAYMENT SECTION	
NUMBER OF CLASSES	1
SUBTOTAL AMOUNT	100
TOTAL AMOUNT	100
SIGNATURE SECTION	
SIGNATURE	/Michael Demman/
SIGNATORY NAME	Michael D. Demman
SIGNATORY DATE	02/07/2007
SIGNATORY POSITION	Chief Executive Officer
FILING INFORMATION	
SUBMIT DATE	Wed Feb 07 15:13:00 EST 2007
FILED DATE	USPTO/A-APP 200 24 102 2 20

	070207151300128715-770906 94-360f7b912e922a61615902 31a871f5d18-CC-147-200702 06121201292199
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USPTO Form 1051 (Rev. 02/2006)
USDA Web Site: <http://www.usda.gov>

**Trademark/Service Mark Amendment to Allege Use
(15 U.S.C. Section 1051(c))**

To the Commissioner for Trademarks:

MARK: SIMPLYQUIT
SERIAL NUMBER: 77090694

The applicant, SIMPLYWELL, LLC, having an address of 4242 Farnam Street, Ste. 270, Omaha, Nebraska United States 68131, is using or is using through a related company or licensee the mark in commerce on or in connection with the goods and/or services as follows:

For International Class: 044, the applicant, or the applicant's related company or licensee, is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance.

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 09/00/2006, and first used in commerce at least as early as 09/00/2006, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) copy of a brochure displaying the mark.
Specimen-1

The applicant hereby appoints Christopher M. Bikus to submit this Trademark/Service Mark Amendment to Allege Use on behalf of the applicant.

A fee payment in the amount of \$100 will be submitted with the form, representing payment for 1 class.

Declaration

Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). Applicant is the owner of the mark sought to be registered, and is using the mark in commerce on or in connection with the goods/services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he/she is properly authorized to execute this document on behalf of the Owner; and all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Signature: /Michael Demman/ Date Signed: 02/07/2007
Signatory's Name: Michael D. Demman
Signatory's Position: Chief Executive Officer

RAM Sale Number: 147
RAM Accounting Date: 02/08/2007

Serial Number: 77090694
Internet Transmission Date: Wed Feb 07 15:13:00 EST 2007
TEAS Stamp: USPTO/AAU-209.34.193.2-20070207151300128

715-77090694-360f7b912e922a6161590231a87
1f5d18-CC-147-20070206121201292199
[Go Back](#)

SimplyQuit_{SM}

Tobacco Cessation Services by SimplyWell_{SM}

HERE IS HOW YOUR HEALTH CAN IMPROVE AFTER YOUR LAST CIGARETTE:

After 20 minutes...

- Blood pressure decreases
- Pulse rate drops
- Body temperature of hands and feet increases

After 8 hours...

- Carbon monoxide levels in blood drop to normal
- Oxygen levels increase to normal

After 48 hours...

- Nerve endings start redeveloping
- Ability to smell and taste is enhanced

After 10 years...

- Risk of lung cancer drops to as little as one-half that of continuing smokers

After 15 years...

- Risk of coronary heart disease is similar to that of people who never smoked

Source: American Lung Association



SimplyWell_{SM} is pleased to offer an EIGHT-STEP smoking cessation program

SimplyQuit_{SM}

In partnership with Arbor Family Counseling, SimplyWell_{SM} provides the services of a Personal Quit Coach and 24-hour unlimited telephone support from Master Level counselors trained in both addiction and tobacco cessation.

Step One: A Great Opportunity

- Initial contact when you are assigned a Personal Quit Coach

Step Two: Personal Quit Strategy

- Identify a Personal Quit Strategy after reviewing self-assessment

Step Three: Commit to Quit

- Build a tobacco free lifestyle and identify a quit date

Step Four: Building Your Health

- Reinforce healthy alternatives and address relapse prevention and access support systems

Step Five: Slaying Off Pack

- Stress the support of your Personal Quit Coach and address any roadblocks to success

Step Six: Tobacco-Free Lifestyle

- Learn the importance of Personal Quit Portfolio and journaling

Step Seven: Progress Evaluation

- Evaluate the progress and program success

Step Eight: Certificate of Success

- Final call to receive a certificate of completion

Studies show **success rates** double when counseling and interactive telephone support are worked into your plan towards a non-smoking life.

Take the steps towards quitting by calling 800.922.7379

SimplyQuit_{SM} 1.800.922.7379

SimplyQuit_{SM}

Tobacco Cessation Services by SimplyWell_{SM}

HERE IS HOW YOUR HEALTH CAN IMPROVE AFTER YOUR LAST CIGARETTE:

After 20 minutes...

- Blood pressure decreases
- Pulse rate drops
- Body temperature of hands and feet increases

After 8 hours...

- Carbon monoxide levels in blood drop to normal
- Oxygen levels increase to normal

After 48 hours...

- Nerve endings start redeveloping
- Ability to smell and taste is enhanced

After 10 years...

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Source: American Lung Association



SimplyWell_{SM} is pleased to offer an EIGHT-STEP smoking cessation program

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- Evaluate the progress and program success

Step Eight: Certificate of Success

- Final call to receive a certificate of completion

Studies show **success rates** double when counseling and interactive telephone support are worked into your plan towards a non-smoking life.

Take the steps towards quitting by calling 800.922.7379

SimplyQuit_{SM} 1.800.922.7379

From: TMDesignCodeComments
Sent: Tuesday, January 30, 2007 00:09 AM
To: cbikus@mcgrathnorth.com
Subject: Notice of Pseudo Mark for Serial Number: 77090694

**ATTORNEY REFERENCE
NUMBER:**

The USPTO may assign pseudo marks, as appropriate, to new applications to assist in searching the USPTO database for conflicting marks. They have no legal significance and will not appear on the registration certificate.

A PSEUDO MARK may be assigned to marks that include words, numbers, compound words, symbols, or acronyms that can have alternative spellings or meanings. For example, if the mark comprises the words 'YOU ARE' surrounded by a design of a box, the pseudo mark field in the USPTO database would display the mark as 'YOU ARE SQUARE'. A mark filed as 'URGR8' would receive a pseudo mark of 'YOU ARE GREAT'.

You are not required to respond to this notice. However, if you would like to suggest additions or changes to the pseudo mark assigned to your mark, please send an email to TMDesignCodeComments@USPTO.GOV or call 1-800-786-9199 to speak to a Customer Service representative. No fee is necessary. (Please include the serial number of your application on ALL correspondence with the USPTO.) The USPTO will review your request and update the record if appropriate.

The USPTO will not send any further response to your e-mail. Check TESS in approximately two weeks to see if the requested changes have been entered. Requests deemed unnecessary or inappropriate will not be entered.

Pseudo marks assigned to the referenced serial number are listed below.

PSEUDO MARK:

SIMPLY QUIT

Trademark/Service Mark Application, Principal Register

Serial Number: 77090694

Filing Date: 01/25/2007

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77090694
MARK INFORMATION	
*MARK	SIMPLYQUIT
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	SIMPLYQUIT
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
APPLICANT INFORMATION	
*OWNER OF MARK	SIMPLYWELL, LLC
*STREET	4242 Farnam Street, Ste. 270
*CITY	Omaha
*STATE (Required for U.S. applicants)	Nebraska
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	68131
LEGAL ENTITY INFORMATION	
*TYPE	LIMITED LIABILITY COMPANY
*STATE/COUNTRY WHERE LEGALLY ORGANIZED	Nebraska
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	044
DESCRIPTION	Counseling in the field of smoking cessation.
FILING BASIS	SECTION 1(b)
ATTORNEY INFORMATION	
NAME	Christopher M. Bikus
FIRM NAME	McGrath, North, Mullin & Kratz, PC LLO

STREET	1601 Dodge Street
INTERNAL ADDRESS	Suite 3700, First National Tower
CITY	Omaha
STATE	Nebraska
COUNTRY	United States
ZIP/POSTAL CODE	68102
PHONE	(402) 341-3070
FAX	(402) 952-1529
EMAIL ADDRESS	cbikus@mcgrathnorth.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
OTHER APPOINTED ATTORNEY	Tracy L. Deutmeyer
CORRESPONDENCE INFORMATION	
NAME	Christopher M. Bikus
FIRM NAME	McGrath, North, Mullin & Kratz, PC LLO
STREET	1601 Dodge Street
INTERNAL ADDRESS	Suite 3700, First National Tower
CITY	Omaha
STATE	Nebraska
COUNTRY	United States
ZIP/POSTAL CODE	68102
PHONE	(402) 341-3070
FAX	(402) 952-1529
EMAIL ADDRESS	cbikus@mcgrathnorth.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	325
TOTAL FEE DUE	325
SIGNATURE INFORMATION	
SIGNATURE	/Michael D. Demman/
SIGNATORY'S NAME	Michael D. Demman
SIGNATORY'S POSITION	Chief Executive Officer

DATE SIGNED	01/24/2007
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Jan 25 09:54:30 EST 2007
TEAS STAMP	USPTO/BAS-209.34.193.2-20 070125095430492729-770906 94-360965ee231cd4e9cd446c d1be8ca278c4-CC-1228-2007 0123095657695244

PDF GENERATED BY
 THE USPTO ELECTRONIC FILING SYSTEM (EFS)

Trademark/Service Mark Application, Principal Register

Serial Number: 77090694
Filing Date: 01/25/2007

To the Commissioner for Trademarks:

MARK: SIMPLYQUIT (Standard Characters, see mark)

The literal element of the mark consists of SIMPLYQUIT. The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, SIMPLYWELL, LLC, a limited liability company legally organized under the laws of Nebraska, having an address of 4242 Farnam Street, Ste. 270, Omaha, Nebraska, United States, 68131, requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

International Class 044: Counseling in the field of smoking cessation.

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

The applicant hereby appoints Christopher M. Bikus and Tracy L. Deutmeyer of McGrath, North, Mullin & Kratz, PC LLO, Suite 3700, First National Tower, 1601 Dodge Street, Omaha, Nebraska, United States, 68102 to submit this application on behalf of the applicant.

Correspondence Information: Christopher M. Bikus
Suite 3700, First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070(phone)
(402) 952-1529(fax)
cbikus@mcgrathnorth.com (authorized)

A fee payment in the amount of \$325 will be submitted with the application, representing payment for 1 class(es).

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /Michael D. Demman/ Date Signed: 01/24/2007

Signatory's Name: Michael D. Demman

Signatory's Position: Chief Executive Officer

RAM Sale Number: 1228

RAM Accounting Date: 01/25/2007

Serial Number: 77090694
Internet Transmission Date: Thu Jan 25 09:54:30 EST 2007
TEAS Stamp: USPTO/BAS-209.34.193.2-20070125095430492
729-77090694-360965ee231cd4e9cd446cd1be8
ca278c4-CC-1228-20070123095657695244

SIMPLYQUIT

SIMPLYQUIT

Exhibit 2

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/090694

Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

OPPOSITION NO.: 91179090

OPPOSER

vs.

SIMPLYWELL, LLC,

APPLICANT

AFFIDAVIT BY SAM GOLD

1. Elgo, Inc. was incorporated on August 25, 2000 with the purpose of manufacturing and selling products to aid in smoking cessation. A copy of the Certificate of Incorporation is attached as Exhibit A.

2. Elgo, Inc. received a sales permit on January 1, 2001 to begin sales of its smoking cessation product using the mark "SimplyQuit," and has been engaged continuously in sales of smoking

cessation products to the present time using the mark. A copy of the sales permit is attached as Exhibit B.

3. Elgo, Inc. established a website whose address is www.simplyquit.com in January 2001, long before Applicant first began using the name SimplyQuit and before Applicant filed its intent-to-use trademark application. Elgo, Inc. is and has been engaged in commerce using the “simplyquit” website and the mark to sell products useful for smoking cessation. A copy of the confirmation of the establishment of the simplyquit website from GoDaddy is attached as Exhibit C.

4. Elgo, Inc., through its principal and share holder, Ely Gold, applied for a trademark on September 22, 2001 (application no. 78/085086), and timely responded to a Notice of Abandonment by filing a petition to revive with the requisite fee and response due. However, due to Office error, the petition was not acted upon and the trademark application was not reinstated and the mark allowed to be registered. Correction of this Office error is pending, and registration is expected.

5. Opposer has invested considerable funds to advertise its smoking cessation products using the trademark “SimplyQuit” on the internet, in print media, radio and on television. In particular, Elgo Inc. advertised SimplyQuit simulated cigarette and SimplyQuit Step Stop Smoking guide with the following national media companies: Stardust Media LCC, Central Point Media, TV sales Pros.LCC, PSST, and on the following nation-wide TV stations: Comedy Central, Family Net, Great American Country, WBIH-TV, WYBE-LP, WCTV, KBTB, UATV, KFWD, WKAG, WYB33, KETK, CNTV, KMIR TV, TVHH. A copy of the TV commercial spot is available on the website www.CrewClean.com. Elgo Inc. advertised SimplyQuit simulated cigarette and

SimplyQuit Step Stop Smoking guide on the following radio stations: KQQU (Omaha, Nebraska Radio Station), KNIK, Talk Radio and others. A copy of the radio commercial is posted on the website www.CrewClean.com. Elgo Inc. advertised SimplyQuit simulated cigarette and SimplyQuit Step Stop Smoking guide with the following national newspapers and magazines: Globe, The National Enquirer, Star, Outdoor Life, Prevention, Inventors Digest, Golf, Entertainment Today, Times Mirror, Mystery, Autoworld News, PennySaver, Acorn, Alaska Bush Shopper.

6. Prior to the filing date of SimplyWell's trademark application, Elgo, Inc. had invested substantial sums in advertising to generate consumer awareness of its smoking cessation products and good will toward its business, had invested substantial sums of money to manufacture smoking cessation products as well as packaging materials identifying the products by the tradename "SimplyQuit", had invested substantial sums of money to obtain and maintain a patent on Elgo, Inc.'s products for smoking cessation, and had sold thousands of units of SimplyQuit simulated cigarettes and generated sales of hundreds of thousands of dollars.

7. Elgo, Inc. has generated consumer awareness and goodwill for its smoking cessation products by virtue of their successful use as an aid to achieving smoking cessation and by virtue of Elgo, Inc.'s reliability and the availability of its products.

8. Applicant is applying for registration of the same trademark "SimplyQuit" which is already in use in commerce by Elgo, Inc. for the purpose of aiding in smoking cessation.

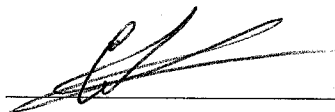
9. Elgo, Inc. claims priority for the mark "SimplyQuit" by virtue of having used the mark in commerce long before Applicant filed its intent-to-use trademark application on January 25,

2007, and by virtue of the prior trademark application filed by Ely Gold, a principal of Elgo, Inc., on September 22, 2001. Further, Elgo, Inc. has used the name "SimplyQuit" as a trademark and tradename long before Applicant's first use of the name.

10. Elgo, Inc., since long before Applicant filed its intent-to-use application for the "SimplyQuit" mark filing, has promoted and marketed the goods offered under the "SimplyQuit" tradename and trademark. By reason of such advertising, marketing and promotion, the "SimplyQuit" tradename and trademark now enjoys valuable goodwill and enviable reputation and is a well known mark in the area of smoking cessation.

* * *

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the patent under examination.



Sam Gold

03/04/08

Date

Exhibit A to
Affidavit by Sam Gold

2259142

ARTICLES OF INCORPORATION
OF
ELGO, INC.

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

AUG 25 2000

BILL JONES, Secretary of State

I

The name of this corporation is:

ELGO, INC.

II

The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.

III

The name in the State of California of this corporation's initial agent for service of process is: Corporation Service Company which will do business in California as CSC-Lawyers Incorporating Service.

IV

This corporation is authorized to issue only one class of stock; and the total number of shares which this corporation is authorized to issue is:

500,000 At No Par Value.

Dated: August 25, 2000

E. Ransom

Eric M. Ransom, Incorporator



Exhibit B to Affidavit by Sam Gold

DISPLAY CONSPICUOUSLY AT PLACE OF BUSINESS FOR WHICH ISSUED

CALIFORNIA STATE BOARD OF EQUALIZATION

SELLER'S PERMIT



ACCOUNT NUMBER

1/1/2001

ELGO, INC.

ELGO, INC.

23679 CALABASAS ROAD, #216

CALABASAS, CA 91302

THIS PERMIT DOES NOT
AUTHORIZE THE HOLDER
TO ENGAGE IN ANY
BUSINESS CONTRARY TO
LAWS REGULATING THAT
BUSINESS OR TO
POSSESS OR OPERATE
ANY ILLEGAL DEVICE.

IS HEREBY AUTHORIZED PURSUANT TO SALES AND USE TAX LAW TO ENGAGE IN THE
BUSINESS OF SELLING TANGIBLE PERSONAL PROPERTY AT THE ABOVE LOCATION

THIS PERMIT IS VALID UNTIL REVOKED OR CANCELED BUT IS NOT TRANSFERABLE. IF YOU SELL YOUR BUSINESS,
OR DROP OUT OF A PARTNERSHIP, NOTIFY US OR YOU COULD BE RESPONSIBLE FOR SALES AND USE TAXES
DUE BY THE NEW OPERATOR OF THE BUSINESS.

Not valid at any other address

FOR GENERAL TAX QUESTIONS, PLEASE TELEPHONE OUR INFORMATION CENTER AT 1-800-400-7115.

BOE-442-R REV. 13 (6-00)

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gridiron with ESPN
& Chad JohnsonICANN DOMAIN
CONFIRMATION
PAGE

BobParsons.com

A Playboy cover girl, world class
athlete & NOW A Go Daddy Girl!
Plus the Go Daddy Live football
report with Ocho Cinco.

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WHOIS
Search Results for:

SIMPLYQUIT.COM

Search Again

Enter a Domain Name to Check

.com

GO

The data contained in GoDaddy.com, Inc.'s WHOIS database, while believed by the company to be reliable, is provided "as is" with no guarantee or warranties regarding its accuracy. This information is provided for the sole purpose of assisting you in obtaining information about domain name registration records. Any use of this data for any other purpose is expressly forbidden without the prior written permission of GoDaddy.com, Inc. By submitting an inquiry, you agree to these terms of usage and limitations of warranty. In particular, you agree not to use this data to allow, enable, or otherwise make possible, dissemination or collection of this data, in part or in its entirety, for any purpose, such as the transmission of unsolicited advertising and solicitations of any kind, including spam. You further agree not to use this data to enable high volume, automated or robotic electronic processes designed to collect or compile this data for any purpose, including mining this data for your own personal or commercial purposes.

Please note: the registrant of the domain name is specified in the "registrant" field. In most cases, GoDaddy.com, Inc. is not the registrant of domain names listed in this database.

Registrant:
elgo inc

23679 calabasas rd.#216
calabasas, ca 91302
United States

Registered through: GoDaddy.com, Inc. (<http://www.godaddy.com>)
Domain Name: SIMPLYQUIT.COM
Created on: 15-Aug-01
Expires on: 15-Aug-08
Last Updated on: 27-Sep-07

Administrative Contact:
gold, sam sago2000@hotmail.com
elgo inc
23679 calabasas rd.#216
calabasas, ca 91302
United States
(818) 989-8586 Fax -- (818) 224-3792

Technical Contact:
gold, sam sago2000@hotmail.com
elgo inc
23679 calabasas rd.#216
calabasas, ca 91302
United States
(818) 989-8586 Fax -- (818) 224-3792

Domain servers in listed order:
NS01.DOMAINCONTROL.COM
NS02.DOMAINCONTROL.COM

Registry Status: clientRenewProhibited
Registry Status: clientTransferProhibited
Registry Status: clientUpdateProhibited
Registry Status: clientDeleteProhibited

See [Underlying Registry Data](#)
Report Invalid Whois

Available TLDs

<input type="checkbox"/> SIMPLYQUIT.NET	\$9.99/yr
<input type="checkbox"/> SIMPLYQUIT.ORG	\$9.99/yr
<input type="checkbox"/> SIMPLYQUIT.INFO	\$2.99/yr SAVE!
<input type="checkbox"/> SIMPLYQUIT.BIZ	\$9.99/yr
<input type="checkbox"/> SIMPLYQUIT.US	\$7.99/yr
<input type="checkbox"/> SIMPLYQUIT.NAME	\$9.99/yr

You might also consider:

<input type="checkbox"/> SIMPLYQUITONLINE.COM	\$9.99/yr
<input type="checkbox"/> ONLINESIMPLYQUIT.COM	\$9.99/yr
<input type="checkbox"/> SIMPLYQUITHOME.NET	\$9.99/yr
<input type="checkbox"/> HOMESIMPLYQUIT.NET	\$9.99/yr
<input type="checkbox"/> SIMPLYQUITSITE.ORG	\$9.99/yr
<input type="checkbox"/> SITESIMPLYQUIT.ORG	\$9.99/yr
<input type="checkbox"/> SIMPLYQUITWEB.INFO	\$2.99/yr SAVE!
<input type="checkbox"/> WEBSIMPLYQUIT.INFO	\$2.99/yr SAVE!
<input type="checkbox"/> SIMPLYQUITLIVE.BIZ	\$9.99/yr
<input type="checkbox"/> LIVESIMPLYQUIT.BIZ	\$9.99/yr
<input type="checkbox"/> SIMPLYQUITBLOG.US	\$7.99/yr

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Quit Smoking Shot

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Shot

Exhibit 3

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/090694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

OPPOSITION NO.: 91179090

OPPOSER

vs.

SIMPLYWELL, LLC,

APPLICANT

OPPOSER'S RESPONSE TO APPLICANT'S
FIRST SET OF DOCUMENT REQUESTS TO OPPOSER

TO: SimplyWell, LLC by and through their attorney Christopher M. Bikus, McGRATH
NORTH MULLIN & KRATZ, PC LLO, Suite 3700, First National Tower, 1601 Dodge Street
Omaha, Nebraska 68102

COMES NOW Elgo, Inc. ("Elgo"), and pursuant to the provisions of Rule 34 of the Federal
Rules of Civil Procedure and Trademark Rule 2.120, responds to SimplyWell, LLC's
("SimplyWell") First Set of Interrogatories as follows.

GENERAL OBJECTIONS

1. Elgo has not yet completed its investigation of the facts in this matter, has not completed discovery, and has not completed trial preparation. Accordingly, Elgo is providing its present responses in a good faith effort to comply with SimplyWell's Document Requests.

Further investigation, discovery and trial preparation may lead to the discovery of additional information and facts. The following responses are made upon the basis of information available to Elgo at this time. It is anticipated that future discovery and independent investigation could supply additional facts or information, add meaning to known facts, may establish entirely new factual conclusions and contentions, all of which may lead to substantial additions to, changes in, and variations from the response set forth herein. Accordingly, the answers made herein are without prejudice to the right of Elgo to provide evidence at time of trial.

2. Elgo objects to each Interrogatory to the extent that it purports to require the disclosure of information which is protected by the attorney-client privilege, work product doctrine, proprietary or trade secret privileges, or any other privilege, immunity or exemption. No documents for which such privileges are asserted will be produced.

3. Elgo objects to the extent that these Document Requests seek to require to produce documents within the possession, custody or control of third parties.

4. Elgo objects to the Document Requests which seek confidential, proprietary, commercial or financial information without the entry by the Court of an appropriate Protective Order.

5. Elgo objects to the Definitions and Instructions contained within the Document Requests to the extent that they purport to impose obligations and duties on Elgo beyond those under the Federal Rules of Civil Procedure.

6. Elgo specifically incorporates each of the foregoing General Objections into each of the answers to SimplyWell's Document Requests and when appropriate, will state additional specific objections to each such discovery request. The answers of Elgo to SimplyWell's discovery are made subject to and without waiving these general and specific objections of Elgo.

OPPOSER'S ANSWERS TO DOCUMENT REQUESTS

Document Request No. 1: Produce all Documents and tangible things identified in response to Applicant's First Set of Interrogatories to Opposer.

Response:

Opposer objects to this Request to the extent that it purports to require the disclosure of information that is protected by the attorney-client privilege, work product doctrine, and confidential business documents, and is unduly burdensome in view of the excessive number of Interrogatories. Without waiving said objections, Opposer states that the sample specimen and other documentary evidence from Opposer's U.S. Trademark Application No. 78/085,086 is available to Applicant via the USPTO Trademark Document Retrieval system. In addition, links to copies of television and radio advertisements and other information are available to Applicant via Opposer's SimplyQuit website at www.simplyquit.com.

Document Request No. 2: Produce all Documents which record, refer to, or relate to any licenses, assignments, distribution agreements or other agreements, contracts, and/or arrangements between Opposer and any third party which relate in any manner to Opposer's Mark.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 3: Produce all Documents which relate to Opposer's investigation of Opposer's Mark for its availability for adoption and registration.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 4: Produce all Documents which relate to Opposer's use of Opposer's Mark in connection with products sold and/or services offered by and/or intended to be sold, offered, or promoted by Opposer under Opposer's Mark.

Response:

Opposer objects to this Request to the extent that it purports to require the disclosure of information that is protected by the attorney-client privilege, work product doctrine, and confidential business documents. Without waiving said objection, Opposer states that Applicant can refer to Opposer's website <http://www.simplyquit.com> for further information.

Document Request No. 5: Produce representative samples of all goods and/or services bearing Opposer's Mark or upon which Opposer intends to use Opposer's Mark in the future.

Response:

Applicant can purchase samples from Opposer using Opposer's website, <http://www.simplyquit.com>.

Document Request No. 6: Produce all Documents which record, refer to, or relate in any manner to the subject matter of this opposition proceeding.

Response:

Opposer objects to this Request to the extent that it purports to require the disclosure of information that is protected by the attorney-client privilege, work product doctrine, and confidential business documents, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 7: Produce all Documents which record, refer to, or relate to Opposer's advertising, intended advertising, promotion, and/or intended promotion of any goods sold and/or services offered by and/or intended to be sold, offered, or promoted by Opposer under Opposer's Mark.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Opposer directs Applicant's attention to Opposer's website, and representative television and radio advertisements which are available on Opposer's website, <http://www.simplyquit.com> . In addition, Opposer has advertised with various national media companies, including Stardust Media LLC, Central Point Media, TV Sales Pros LLC, PSST; print media including *Globe*, *National Enquirer*, *Star*, *Outdoor Life*, *Prevention*, *Inventor's Digest*, *Golf*, *Entertainment Today*, *Times Mirror*, *Mystery*, *Autoworld News*, *PennySaver*, *Acorn*, *Alaska Bush Shopper*; radio stations, including KQQU (Omaha Nebraska), KNIK, Talk Radio; and TV channels including Comedy Central, Family Net, Great American Country, WBIH TV, WYBE-LP, WCTV, KBTU, UATV, KFWD, WKAG, WYB33, KETK, CNTV, KMIR TV, TVHH.

Document Request No. 8: Produce all Documents which record, refer to, or relate to Opposer's sales of any goods sold and/or services offered by Opposer under Opposer's Mark for the last five (5) years.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Opposer has reported income throughout the time period since the filing of Opposer's trademark application, including during the last five years.

Document Request No. 9: Produce all Documents which record, refer to, or relate to the selection, design, adoption, proposed use of, decision to use, and first use of Opposer's Mark, including samples of any names, designations and/or other marks considered and rejected.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. In particular, in view of Opposer's prior and continuing use, Opposer's selection and decision to adopt and use Opposer's SimplyQuit Mark at the time of filing Opposer's trademark application (2001) is not relevant to this Opposition. Notwithstanding these objections, Opposer states that the first use of Opposer's Mark and other documentary evidence from Opposer's U.S. Trademark Application No. 78/085,086 is available to Applicant via the USPTO Trademark Document Retrieval system.

Document Request No. 10: Produce all Documents which record, refer to, or relate to any searches, investigations, studies, analyses, or inquiries conducted by or on behalf of Opposer, or by any person acting for or on its behalf, regarding the availability and/or registration ability of Opposer's Mark.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks attorney-client privileged and/or confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. In view of Opposer's prior and continuing use, Opposer's selection and decision to adopt and use Opposer's SimplyQuit Mark at the time of filing Opposer's trademark application is not relevant to this Opposition.

Document Request No. 11: Produce all Documents which refer to, relate to, or are in any way concerned with the corporation, filing and/or prosecution of any applications or registration, state or federal, of Opposer's Mark.

Response:

Opposer objects to the request for documents regarding "corporation" on the grounds that the Request is ambiguous and therefore overly broad, unduly burdensome, and/or requesting confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Opposer states that the first use of Opposer's Mark and other documentary evidence from Opposer's U.S. Trademark Application No. 78/085,086 is available to Applicant via the USPTO Trademark Document Retrieval system. The undersigned attorney further states that a representative of the USPTO called and requested that a copy of the Office Action preceding the Notice of Abandonment issued in Opposer's application be provided to complete the file; a copy of the missing Office Action was provided, and the complete application history

is now available.

Document Request No. 12: Produce a representative sample of each different logo type, design, packaging, font of type or style in which Opposer's Mark has been used, is being used, or is intended to be used, by or on behalf of Opposer.

Response:

Opposer states that a specimen of Opposer's Mark from Opposer's U.S. Trademark Application No. 78/085,086 is available to Applicant via the USPTO Trademark Document Retrieval system. Opposer further directs Applicant's attention to Opposer's website, and representative newspaper, magazine, television and radio advertisements which are available on Opposer's website, <http://www.simplyquit.com> . Copies of print advertisements are available at Opposer's office if required.

Document Request No. 13: Produce a representative sample of each and every advertisement, intended advertisement, item of promotional material, and/or intended item of promotional material printed and/or disseminated by or for Opposer in which Opposer's Mark has been displayed or is displayed for the last (5) years.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Opposer states that a specimen of Opposer's Mark from Opposer's U.S. Trademark Application No. 78/085,086 is available to Applicant via the USPTO Trademark Document Retrieval system. Opposer further directs Applicant's attention to Opposer's website, and representative television and radio advertisements which are available on Opposer's website, <http://www.simplyquit.com> . Additional advertising was itemized in the response to Document Request No. 7. Copies of print advertisements are available at Opposer's office if required.

Document Request No. 14: Produce copies of all television commercials, press releases, radio scripts, and other media advertising not previously requested herein, prepared by or for Opposer, whether or not released or aired, in which Opposer's Mark appears or has appeared during the last (5) years.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 15: Produce all Documents which record, refer to, or relate to

Opposer's advertising and/or promotional expenditures or expected advertising and/or promotional expenditures, for any goods offered for sale, sold and/or distributed under Opposer's Mark including, but not limited to, the advertising medium, the dates of any such advertisements or promotions, and the costs associated with, such advertisements and/or promotions.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Opposer has advertised Opposer's products using print media, internet, radio and television, as itemized in the Response to Document Request No. 7 above throughout the time period from 2001 to the present.

Document Request No. 16: Produce all Documents which record, refer to, or relate to the amount of sales (actual and/or projected) by calendar quarter of goods sold by or for Opposer under Opposer's Mark including, but not limited to, the identification of the goods or services, the number of units and/or services sold, the dates of the sales, and the dollar amount of the sales.

Response:

Opposer objects to this Request on the grounds that it is overly broad, unduly burdensome, seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding these objections, Opposer has reported income from the sales of Opposer's goods under Opposer's Mark "SIMPLYQUIT" throughout the time period since Opposer first used Opposer's Mark in 2001 until the present.

Document Request No. 17: Produce all Documents evidencing any confusion between

Opposer, Opposer's Mark, and Applicant and Applicant's Mark, including inquiries, comments,

or other communications by or from customers, suppliers, manufacturers, distributors, or members of the public, either written or oral, showing any confusion, suspicion, belief or doubt as to a possible relationship between Opposer and Applicant or the origin of their respective products and/or services.

Response:

Documents associated with this Opposition.

Document Request No. 18: Produce all Documents which record, refer to, or relate to any inquiry, investigation, evaluation, analysis, or survey conducted by Opposer or any person acting for or on behalf of Opposer regarding any issues involved in this proceeding.

Response:

Opposer objects to this Request on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 19: Produce all Documents which record, refer to, or which constitute any research, reports, surveys, or studies conducted by or on behalf of Opposer of customer or consumer perception of Opposer's Mark.

Response:

Opposer objects to this Request on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 20: Produce all documents in Opposer's possession or control that refer or relate to Applicant or Applicant's Mark.

Response:

Opposer objects to this Request on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 21: Produce all press releases, articles, and clippings relating to or commenting on goods or services marketed or sold under Opposer's Mark.

Response:

An article in *The Acorn* featured Ely Gold and his simulated cigarette, published on February 14, 2002. See <http://www.theacorn.com/News/2002/0214/Community/033.html>. Whoopi Goldberg hosted an episode of ABC's "The View" on Monday Oct 29, 2007, in which smoking cessation methods were discussed, including the use of SIMPLYQUITTM simulated cigarettes.

Document Request No. 22: Produce all documents that refer or relate to third-party state and federal registrations and/or applications for registration and/or third-party uses which incorporate the term SIMPLYQUIT.

Response:

There are none.

Document Request No. 23: Produce a copy of any statements and/or opinions, including but not limited to all drafts of statements and opinions, of any expert obtained by Opposer or any person acting for or on behalf of Opposer regarding any of the issues in this opposition proceeding.

Response:

Opposer objects to this Request on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 24: Produce a copy of all Documents, other than those produced in

response to any of the foregoing requests, upon which Opposer intends to rely in connection with this opposition proceeding.

Response:

Opposer objects to this Request on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 25: Produce a copy of all Documents that relate to any period of non-use of Opposer's Mark.

Response:

There are none.

Document Request No. 26: Produce a copy of all Documents that relate to Opposer's abandonment of U.S. Trademark Application Serial No. 78/085,086.

Response:

Opposer states that documents related to Opposer's U.S. Trademark Application No. 78/085,086 are available to Applicant via the USPTO Trademark Document Retrieval system. The undersigned attorney further states that a representative of the USPTO called the undersigned attorney requesting that a copy of the Office Action preceding the Notice of Abandonment issued in Opposer's application be provided to complete the file; a copy of the missing Office Action was provided, and the complete application history is now available.

Document Request No. 27: Produce all documents identified in, or relied upon to form, your responses to Applicant's First Set of Interrogatories to Opposer which have not already been produced in Response to the foregoing requests.

Response:

Opposer objects to this Request on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Dated this 14th day of April, 2008

Respectfully submitted,

ELGO, INC., Opposer

By: /Cynthia R. Moore/
Cynthia R. Moore
794 Los Robles Ave.
Palo Alto, CA 94306
(650) 565-8185
(650) 493-1993

ATTORNEY FOR OPPOSER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing “Response to Applicant’s First Set of Document Requests” was served on Christopher Bikus, the attorney for Applicant SimplyWell, LLC, by first class mail postage prepaid and by email this 14^h day of April 2008, addressed as follows:

McGRATH NORTH MULLIN & KRATZ, PC LLO
Suite 3700, First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Attention: Christopher M. Bikus, Esq.

/Cynthia R. Moore/
Cynthia R. Moore
Attorney for Opposer

Exhibit 4

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

Exhibit 5

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

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February 14th, 2002

Search Archives:

teen won't quit on new invention
By John Loesing
Acorn Staff Writer



NEW IDEA-Ely Gold, 17, shows the device he made to help people quit smoking because of his father's cigarette addiction.

There are almost 50 million smokers in the United States and counting, but the only nicotine habit that concerned young Ely Gold was his father's.

Sam Gold, a Lithuanian citizen who brought his family to America in 1990, had been a smoker for decades when his son began begging him to quit. Every year more than 400,000 Americans die from smoking related diseases and Ely didn't want to see his father wind up as another statistic.

Ely, a 17-year-old Calabasas High School student, watched his father try everything—the patch, the gum, the cold turkey—but to no avail.

"You name it I tried it," said the boy's father, and his pack-a-day habit continued.

Last year, Ely decided to take matters into his own hands. He invented a plastic, cigarette-looking device that allows a person to simulate smoking while breaking the nicotine habit at the same time.

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"Simply Quit" is the name of the product, and for Ely's father it worked. He quit.

While Ely recognizes that nicotine is the agent that hooks smokers, he says people must overcome their oral fixation with cigarettes before they can stop smoking altogether. That's where Ely's faux cigarette comes into play.

"It tricks you into thinking you're holding a real cigarette but you're not," Ely said.

Ely packages his product with a two-step, learn-how-to-stop program available on the Internet (www.simplyquit.com).

In "step one," smokers get to try the device free. In "step two," customers pay \$9.95 for one of the flavor-tasting cigarettes with a purported useful life of up to three months.

"I think the first week free program is proof that I'm serious about helping people," Ely said. "But it takes at least three months to develop the strength necessary to stop this addiction once and for all."

Ely and his father obtained the necessary manufacturing materials last October and went to work building a prototype. At first they thought about modifying a traditional cigarette holder to help wean smokers, but decided to make a device that looks more like a real cigarette.

"When you inhale it generates special smells that are pleasant to smokers," Sam Gold said. "Instead of cigarettes they can use this one and quit smoking ... [Ely] came up with something good not only for his dad and his family, but people all around."

According to Ely, Simply Quit's pleasant taste also helps prevent users from wanting to binge on food. Weight gain is common for smokers who are quitting.

Asked if he's concerned that his son might someday start smoking, Gold said not at all.

"Kids are so smart you don't have to tell them to quit, they tell you."

Exhibit 6

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

[ABOUT THE SHOW](#)

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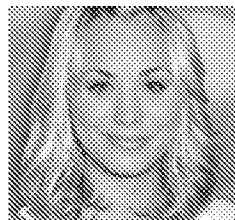
Videos

Check out great clips from past shows..



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Week of October 29, 2007



Monday, Oct. 29

In honor of Breast Cancer Awareness Month, Joy had a giveaway for today's audience that is very close to her heart. Apparel designer and cancer survivor Paula Carbone created the "On The Mend" kit to contain what every woman needs when being treated for and recovering from cancer. The kit includes a plush quilted robe, ballet-type slippers, a lightweight kaban, a handy cosmetics/pill pouch, and a silver "Venus" bracelet--all in a signature tote bag. More importantly,

a portion of the proceeds from each kit sold support Memorial Sloan Kettering Research Center for cancer research. Everyone in today's audience got the gorgeous and comfy quilted robe.

And just wash it! Everyone in today's audience also took home a \$100 gift card from White House | Black Market, which offers sophisticated and stylish apparel and accessories in black and white.

Next, we welcomed star of the new TV show, *The Big Bang Theory*, Kaley Cuoco. Check local listings to catch her as a beautiful but not-so-bright girl who befriends a group of brilliant, but needy neighbors in *The Big Bang Theory*, airing Monday nights.

And as many of you may know, Whoopi has been trying to quit smoking and she needs all the help she can get. Here this morning with absolutely every possible method to kick butt was the medical editor for *Best Life* magazine, Dr. Steven Lamm. From patches to pills to hypnosis, here are all the ways people quit smoking according to Dr. Lamm:

Nicotine Replacement Therapy: Nasal spray, gum, patch, inhaler

- Nicotrol (nasal spray & inhaler)
- Nicorette Cinnamom Surges (gum also in Fresh Mint and Fruit Chilli)
- Nicoderm CQ (stop smoking patch)
- Cammi (stop smoking L'orange)

Prescribed Medications That Reduce Cravings

- Zyprexa (a depression drug that helps people stop smoking)
- Chantix (Varenicline) (stop smoking medication)
- Wellbutrin (Bupropion) (prescription stop-smoking aid that doesn't contain

Schedule

Want to find out who's on TV to know when the show airs? Click the link below to get your answer.

[See the full schedule](#)

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nicotine)

Herbal Medicines

- Ester C
- Pycnogenol
- OPC3 vitamin
- Herbal Medicines (Crave-Rx Drops , Quit it Out Plus Oral Spray & Capsules, Smokers Choice Multi-vitamins)

Complimentary Medicine

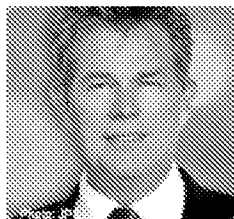
- Laser Treatment (seer into your wrist, hands, ears, nose and side of nose ---helps block out cravings of nicotine)
- Acupuncture (contribution on the ear but can be used all over the body, it depends on the patient)
- Hypnosis

Cigarette Modification Products

- E-Z quit (smokeless cigarette substitute)
- One Step At a Time (filters & removes up to 90% of the nicotine and tar in cigarettes)
- Super Stop (filter)
- Aquafilter (wet filtration)
- Simply Quit (simulated cigarette gives you something to puff on)

Other

- Self-Help Group Nicotine Anonymous
- Zerosmoke (like a little magnet you wear in your ear)
- Cold Turkey
- Talk with your Physician



Tuesday, Oct. 30

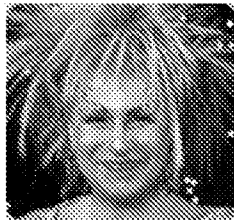
After her awkward interview with Holly Hunter made her an instant celebrity, Mary McCormack was here to explain what really happened when she sat in as our special guest co-host today.

Next, we had a gift guaranteed to brighten the day of today's studio audience when we gave them each a \$150 gift card to Tommy Bahama®, purveyors of island lifestyle™. To view and purchase the very finest in island inspired living, fashion and accessories, visit tommybahama.com or check out Tommy Bahama® Stores.

Then, we welcomed the resident hottie on *Private Practice*, Tim Daly, whose character Dr. Pete Wilder just wants to "play doctor" with Addison. Watch as things heat up between them in the hit new show, *Private Practice*, which airs Wednesday nights at 9/8c on ABC.

If you want to know what's really happening in pop music, our next guest is the perfect go-to guy with the go-to sound—musician, composer and producer of some of your favorite songs, David Foster. He was here to sing some of his most unforgettable hits and to tell us which hot, young artists will be on your iPod soon! Furthermore, David will be joining the world's best-selling tenor, the legendary Andrea Bocelli, for the worldwide theatrical premiere of *Vivere: Andrea Bocelli Live in Tuscan in New York* at the Ziegfeld Theatre on November 1. For more information or to attend this event, go to bocellinow.com.

Finally, since tomorrow is Halloween, everyone in today's audience also took home a 7-set special DVD collection of Fox and MGM horror films.



Wednesday, Oct. 31

Halloween has always been an outrageous extravaganza at *The View* and this year was no exception!

Think back to New York City in 1930. The sound, soul and pulse of the city was up in Harlem at this legendary Cotton Club—and this Halloween we were taking the A train back in time. We invited the ladies and gentlemen of our audience to take a seat and give a warm welcome to our fabulous Cotton Club orchestra, featuring Whoopi as Mr. Cab Calloway, Joy and Sheri as hot Cotton Club show girls and Barbara as a lounge show girl from the greatest night club in New York City, Lou Walters' Lein Quarter.

And of course, it wouldn't be Halloween without plenty of candy! Everyone in our audience got "trick or treat" bags from Mom Snack Food U.S. stuffed with M&M's®, 3 Musketeers®, Snickers® and more.

But that's not all—@ery also got one of Whoopi's all-time favorite Halloween treats, the classic *Fear Lynette Halloween Special* DVD.

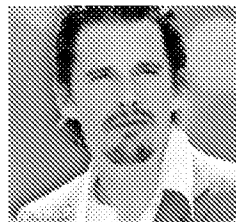
The headline act at the Cotton Club this morning was the legend Tony Danza singing a song by an artist who defined that uptown sound—Quincy

Ellington's "In A Mellow Tone." The treats kept coming because all the studio audience got Tony Bennett's album *TONY BENNETT SINGS THE ULTIMATE AMERICAN SOUNDBOOK, VOLUME 1*, the book *TONY BENNETT IN THE STUDIO: A LIFE OF ART & MUSIC* and the documentary *TONY BENNETT: THE MUSIC NEVER ENDS* on DVD.

Next, the man who goes *Cross Country* to get people in harmony with their past was here today. Famous psychic John Edward was picking out our own audience members to see who he could reconnect with lost loved ones. Everyone went home with a copy of John Edward's book *PRACTICAL PRAYING USING THE ROSARY TO ENHANCE YOUR LIFE*.

Finally, since the Cotton Club was always jumping with people doing the dance of the era, the Jitterbug, Sham a few more lessons from one of the best song and dance men alive, Ben Vereen (courtesy of Dance Times Square). Ben hit the floor with a show girl named Shari to complete our magnificent Halloween show!

The View would also like to thank today's house band, members of the Jazz at Lincoln Center Orchestra. Everyone in the audience received tickets to see their show *Beyond the Spanish Tinge*.



Thursday, Nov. 1

Today we welcomed *Dancing With the Stars* judge Charlie Ann Healy who joined the ladies as our special guest co-host.

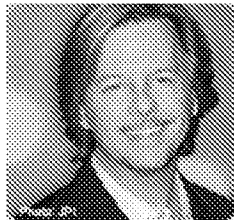
Next, Since Sham is new in town, we got to join her as she hit the streets of Manhattan to get to know her new home, and she got plenty of help from the locals.

Next, in the new movie *Before the Devil Knows You're Dead*, Ethan Hawke's character gets propositioned by his brother to pull a heist that's really close to home. Ethan stopped by this morning to discuss this captivating and dramatic film, the Oscar buzz surrounding it and his new role directing the off-Broadway play, *Things We Want*. Don't miss Ethan Hawke and Philip Seymour Hoffman in *Before the Devil Knows You're Dead*, playing in select theaters now.

Tuesday night's shocking *Dancing With the Stars* elimination had the audience booing and viewers in an uproar. Everyone thought Cheech O!

Sabrina Bryan and her partner Mark Ballas would dance away winners, but they took their final bow right here on *The View* this morning and danced the One-Cha. Tune in as the remaining stars battle it out on the dance floor. ---*Dancing With the Stars* airs Mondays at 8/7c and Tuesdays at 9/8c on ABC.

Thanks to Shopping.com®, a leading online comparison shopping site, everyone in today's audience took home a brand new Apple iPod Shuffle. To save time and money on all your holiday shopping, visit Shopping.com.



Friday, Nov. 2

We ended the week on a great note today when we kicked off the show by giving everyone in the audience a DVD copy of the film, *El Cantante*, starring celebrity couple Marc Anthony and Jennifer Lopez.

Next, we welcomed funny man David Spade, who plays a blissfully unmarried bachelor on the sitcom *Rules of Engagement*. He was telling us how his character on the show has recently found a fellow hell-raiser in guest star Heather Locklear. Check your local listings for *Rules of Engagement* on Monday nights.

Then, Whoopi was showing you how to put your best foot forward with a fashion show full of her favorite footwear. Here are some of her top picks:

1. Jump Shoes: Started in 1975 by Henry Chan to satisfy the demand for affordable fashion in the Asian youth market. However, it has since expanded to over 30 countries, and continues to meet the lifestyle of the stylish, global consumer. (jumpcorp.com)
2. John Fluevog Shoes: Started in 1978, these shoes are distinct and especially great because every pair has a positive message written on the sole. (fluevog.com)
3. Ed Hardy Shoes: Started in 2005 by Christian Audigier, this line is inspired by the tattoo artist Ed Hardy. (edhardyshop.com)
4. Terra Plane Shoes: For the environmentally conscious, these shoes are made from recycled materials using non-toxic glues that are safe for the environment. (terraplane.com)
5. Sanita® Shoes: This 100 year-old company has great dogs that are hand-made in Europe and great for anyone who spends long periods of time on their feet. (sanitadogs.com)
6. BAND-AID® Brand ACTIV-FLEX™ BLISTER BLOCK® Sock: Although

this item is not a shoe, it's also one of Whoopi's favorite foot products that stops blisters before they start so that you won't have to choose between style and comfort in footwear. (brandad.com)

Because Whoopi loves these unique shoe brands so much, she wanted all of our audience members to try them out as well. They all went home with gift certificates for shoes from each of these companies.

Finally, from stylish shoes to sensational food—our last guest was southern-inspired chef Dailah Winder, who came straight from Philadelphia—and she may just replace the cheese steak as the official food of Philly with her world-famous macaroni and cheese. Get a pen and paper and give your diet a *raff!* Here is how to make the greatest, godliest, most belt-busting macaroni and cheese ever.

AM HAI Macaroni and Cheese (Serves 12 to 16)

Ingredients:

3 pounds elbow macaroni
12 eggs
1 cup cultured Velveta cheese
¼ pound (2 sticks) butter, melted
6 cups half-and-half
4 cups grated sharp yellow cheddar cheese
2 cups grated extra sharp white cheddar cheese
1½ cups grated mozzarella cheese
1 cup grated Asiago cheese
1 cup grated Gruyere cheese
1 cup grated Monterey Jack cheese
1 cup grated Munster cheese
1/3 teaspoon salt
1 tablespoon black pepper

Directions:

Preheat the oven to 325°F. Bring a large soup-pan of salted water to a boil. Add the macaroni and cook until still slightly al dente, about 10 minutes. Drain and set aside to keep warm. Whisk the eggs in a large bowl until frothy. Combine the Velveta, butter, and two cups of the half-and-half in a large bowl. Add the warm macaroni, tossing until the cheese has melted and the mixture is smooth. Add the remaining half-and-half, three cups of the sharp yellow cheddar cheese, the remaining grated cheeses, and salt and pepper, tossing until completely combined. Pour the mixture into a 9 x

ABC.com: The View Recaps

13-inch casserole or baking dish and bake for about 30 minutes. Sprinkle with the remaining one cup of sharp yellow cheddar cheese and bake until golden brown on top, about 30 minutes more. Serve hot.

We gave everyone in the audience a sample along with a copy of O'Leary's cookbook *DELLAH'S EVERYDAY SOUL: SOUTHERN COOKING WITH STYLE*.

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Exhibit 7

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/090,694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

OPPOSITION NO.: 91179090

OPPOSER

vs.

SIMPLYWELL, LLC,

APPLICANT

AFFIDAVIT BY CYNTHIA R. MOORE

1. I am the attorney of record for Opposer Elgo, Inc. and for Opposer's trademark application pending before the United States Trademark Office.
2. This affidavit is submitted for the purpose of establishing Opposer's prior and continuing use of the mark SIMPLYQUIT for the sale of goods and services for smoking cessation.
3. On May 7, 2008, I accessed the website archive "The Wayback Machine" at <http://www.archive.org>, which engages in periodic archiving of publicly accessible websites. I saved and printed out a record of Opposer's simplyquit.com website activities, which demonstrates the continuous use of the domain name simplyquit.com, the simplyquit.com

website, and the mark SIMPLYQUIT in the sale and marketing of Opposer's simulated cigarettes and smoking cessation program. This record is labeled Exhibit 8.

4. The record shows 123 snapshots taken between October 16, 2001 and August 29, 2007, with updates noted on 16 dates: October 16, 2001, October 31, 2001, December 4, 2001, June 6, 2002, June 8, 2002, August 6, 2002, September 23, 2002, November 23, 2002, December 1, 2002, February 9, 2003, July 18, 2003, August 4, 2003, February 3, 2006, July 1, 2006, May 29, 2007 and July 2, 2007, indicating active management of the website throughout the time period.

5. Also on May 7, 2008, I saved and printed out copies of representative archived main web pages for the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007. These web pages demonstrate the continuous use of the domain name simplyquit.com, the simplyquit.com website, and the mark SIMPLYQUIT in the sale and marketing of Opposer's simulated cigarettes and smoking cessation program. They also demonstrate developing advertising activity: first website in 2001, sample TV commercials in 2002, sample radio commercial in 2003. Additional language pages were added over time as well starting with English in 2001, Spanish in 2002, and Russian in 2003. These archived web pages are provided in Exhibit 8.

6. The first archived web page shows the availability in 2001 of a "Step-by-Step Stop Smoking Program" in addition to a simulated cigarette, both offered under the SIMPLYQUIT mark, and also bundled as a "SIMPLYQUIT Step 1 Kit."

7. Also on May 7, 2008, I saved and printed a copy of an article originally published on February 14, 2002 in *The Acorn* from the newspaper's archive at <http://www.theacorn.com/News/2002/0214/Community/033.htm>. The article describes the invention of the SIMPLYQUIT simulated cigarette, and its availability via the simplyquit.com website. This document is provided as Exhibit 5.

8. Also on May 7, 2008, I saved and printed out copies of the archived web page for ABC's "The View" for the program which aired on October 29, 2007 from <http://abc.go.com/daytime/theview/recaps>. The printout indicates that the show for that day included a segment on Whoopi Goldberg's attempts to quit smoking. A variety of products and methods were presented including the SIMPLYQUIT simulated cigarette. This document is provided as Exhibit 6.

* * *

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the application or document or registration resulting therefrom.

/Cynthia R. Moore/ May 7, 2008

Cynthia R. Moore

Date

CERTIFICATE OF FILING

The undersigned hereby certifies that a copy of the foregoing "Affidavit" was filed electronically through the Electronic System for Trademark Trial and Appeals located on the U.S. Patent and Trademark Office's website <uspto.gov> on this 7th day of May, 2008.

/Cynthia R. Moore/

Cynthia R. Moore

Attorney for Opposer

Exhibit 8

to

Motion for Summary Judgment

Trademark Opposition No. 91179090



Enter Web Address:

All

Take Me Back

Adv. Search

Compare A

Searched for <http://simplyquilt.com>

Note some duplicates are not shown. [See all.](#)
* denotes when site was updated.
Material typically becomes available here 6 months after collection. [See FAQ.](#)

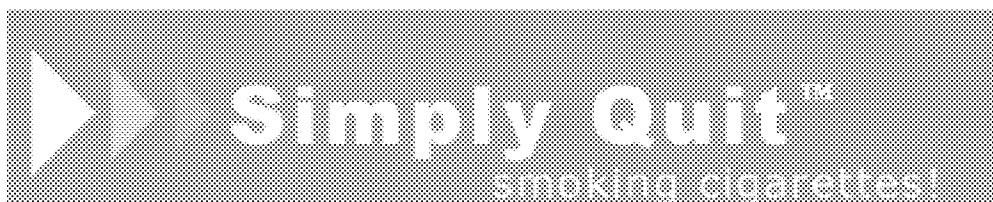
Search Results for Jan 01, 1996 - Nov 09, 2007

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
0 pages	0 pages	0 pages	0 pages	0 pages	3 pages	12 pages	24 pages	19 pages	12 pages
					Oct 16, 2001 *	Jan 26, 2002	Feb 09, 2003 *	Jan 21, 2004	Jan 26, 2005
					Oct 31, 2001 *	Jun 06, 2002 *	Feb 12, 2003	Feb 02, 2004	Jan 29, 2005
					Dec 04, 2001 *	Jun 08, 2002 *	Feb 14, 2003	Mar 24, 2004	Feb 04, 2005
						Aug 06, 2002	Feb 17, 2003	Apr 01, 2004	Feb 07, 2005
						Sep 23, 2002 *	Mar 27, 2003	Apr 03, 2004	Feb 09, 2005
						Sep 28, 2002	Mar 29, 2003	May 20, 2004	Feb 10, 2005
						Sep 30, 2002	Apr 20, 2003	Jun 05, 2004	Mar 03, 2005
						Oct 04, 2002	Apr 22, 2003	Jun 06, 2004	Mar 05, 2005
						Nov 23, 2002 *	May 30, 2003	Jun 12, 2004	Apr 04, 2005
						Nov 27, 2002	Jun 01, 2003	Jun 14, 2004	Oct 01, 2005
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							Jul 18, 2003 *	Aug 05, 2004	
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							Dec 19, 2003		

Internet Archive Wayback Machine

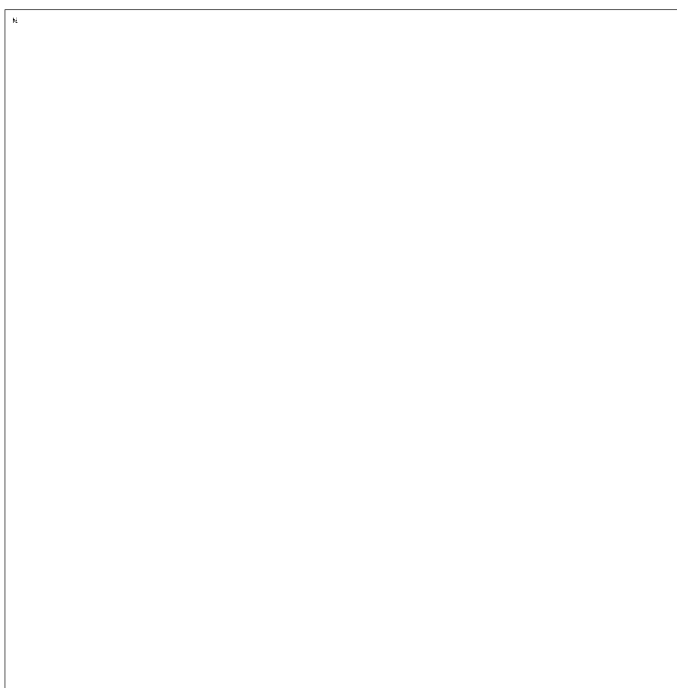
http://

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Simply Quit™ smoking without drugs, physicians, hypnosis and other costly t

SQ Step 1 (includes Simply Quit™ Smoking Program)



We have created a simple yet unique program that we are positive will help you quit smoking within a short period of time. If you really want to quit and are serious about our program, we are so confident in it that we give it away for **FREE!**

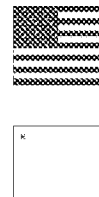
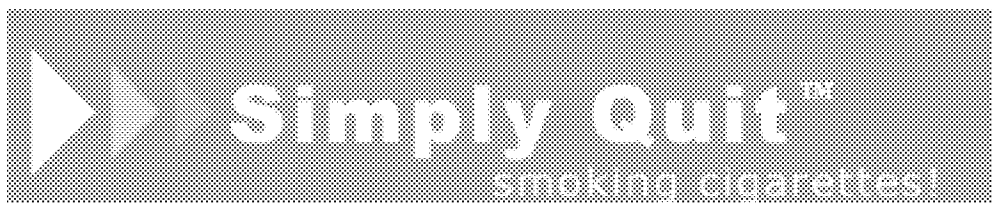
Our Simply Quit™ (SQ) Step 1 kit, which includes a simulated cigarette (the Simply Quit™ Program) is **FREE** \$6.95 for Shipping and handling.

Please give us a chance to help you overcome your addiction and together we will definitely win!

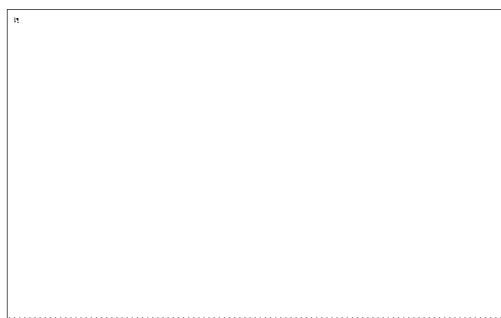
SIMPLY QUIT™?
THE FREE STEP-BY-STEP STOP S
PROGRAM

THE DEADLY LEGACY

THE OTHER SERVICES



Simply Quit™ smoking without drugs, physicians, hypnosis or other costly treatments!



The Simply Quit™ Kit Includes a SQ Simulated Cigarette and a Step-By-Step Quit Smoking Guide



If you don't have Real TV, click here to see Simply Quit.

[Click Here To See Simply Quit](#)

[Click Here To See Simply Quit Commercial](#)

We have created a simple yet unique program that we are positive will help you quit smoking within a short period of time. It will drastically reduce your daily quantity of cigarettes thereby eventually ending your addiction.

Most smokers fail at their attempts to quit because they can't control their psychological addiction.

When you feel the need to smoke just use Simply Quit™ and lose your cravings. You don't need to quit Simply Quit™, just inhale like you would a real cigarette. That's what you usually enjoy but without the tar and nicotine. That is what makes Simply Quit™ a miracle. It is absolutely harmless. Great to use in public areas like offices, airplanes, and even in your car.

If you really want to quit we can help you. Be confident in our product.



Simply Quit™ Quit Smoking Kit

Simply Quit™ is Drug and Nicotine free.

FDA Approved Materials

Simply Quit™ (SQ) Simulated Cigarettes replace the oral addiction caused by smoking cigarettes.

Order Now

Patent Pending. Made In USA.

Give us a chance to help you quit the addiction and together we will definitely

For a Limited Time Only: We offer Step-By-Step Quit Smoking Guide with the purchase of a simulated

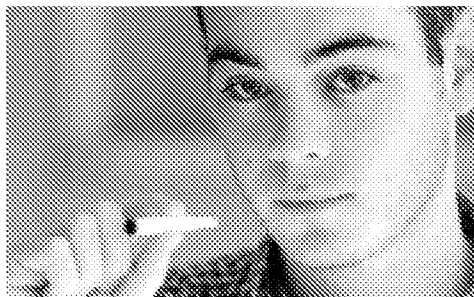
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Copyright? Elgo, Inc.



Simply Quit™ smoking without drugs, physicians, hypnosis or other costly treatments



The Simply Quit™ Kit Includes a SQ Simulated Cigarette and a Step-By-Step Quit Smoking Guide



If you don't have

[Click Here To See Simply Quit Commercial](#)

[Click Here To See Simply Quit Commercial](#)

[Click Here To Hear The Simply Quit Radio](#)

We have created a simple yet unique program that we are confident will help you quit smoking within a short period of time.

- No Drugs!
- No Nicotine!
- No Side Effects!
- No Prescription!
- No Weight Gain!
- No Discomfort!
- Lasts Up to 1 Year!
- 100% Guaranteed!
- Smokeless!
- Made in USA!

Most smokers fail at their attempts to quit because they can't control their psychological addiction (the actual hand-to-mouth ritual) and the craving for cigarettes. SimplyQuit™ gives you control.

When you feel the need to smoke just inhale and lose your cravings. You don't light a cigarette, just inhale like you would a real cigarette. You usually enjoy but without the danger. SimplyQuit™ makes Simply Quit™ a miracle. SimplyQuit™



Simply Quit™ Quit Smoking Kit

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Simply Quit™ (SQ) Simulated Cigarettes replace the oral addiction caused by smoking cigarettes.

Order Now

Patent Pending. Made In USA.

absolutely harmless. Great to use in places like offices, airplanes, and even hospitals.

If you really want to quit we will help. Be confident in our product.

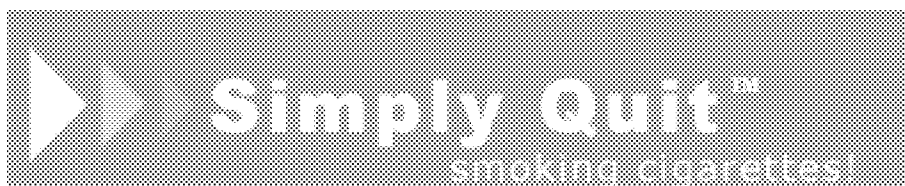
For a Limited Time Only: We offer a Step-By-Step Quit Smoking Guide with the purchase of a simulated cigarette.

THE DEADLY LEGACY

SQ Kit

THE OTHER SERVICES

CrewClean™
Industrial Strength
Cleaning Solution
[Click Here to learn more.](#)



Simply Quit™ smoking without drugs, physicians, hypnosis or other costly treatments



The Simply Quit™ Kit Includes a SQ Simulated Cigarette and a Step-By-Step Quit Smoking Guide



If you don't have

[Click Here To See Simply Quit Commercial](#)

[Click Here To See Simply Quit Commercial](#)

[Click Here To Hear The Simply Quit Radio](#)

We have created a simple yet unique product that we are confident will help you effortlessly quit smoking within a short period of time.

- No Drugs!
- No Nicotine!
- No Side Effects!
- No Prescription!
- No Weight Gain!
- No Discomfort!
- Lasts Up to 1 Year!
- 100% Guaranteed!
- Smokeless!
- Made in USA!

Most smokers fail at their attempts to quit because they can't control their psychological addiction (the actual hand-to-mouth ritual) or the craving for cigarettes. SimplyQuit™ gives you control.

When you feel the need to smoke just use Simply Quit and lose your cravings. You don't light a cigarette, you inhale like you would a real cigarette. Great to use in non-smoking areas like restaurants, bars, etc. You can enjoy but without the danger. This is why Simply Quit™ is a miracle. Simply Quit™ is absolutely safe. Great to use in non-smoking areas like



Simply Quit™ Quit Smoking Kit

Simply Quit™ is Drug and Nicotine free.

FDA Approved Materials

Simply Quit™ (SQ) Simulated Cigarettes replace the oral addiction caused by smoking cigarettes.

Order Now

Patent Pending. Made In USA.

and even hospitals.

If you really want to quit we will help. V confident in our product.

For a Limited Time Only: We offer t
Quit Smoking Guide For FREE!! with
a simulated cigarette.

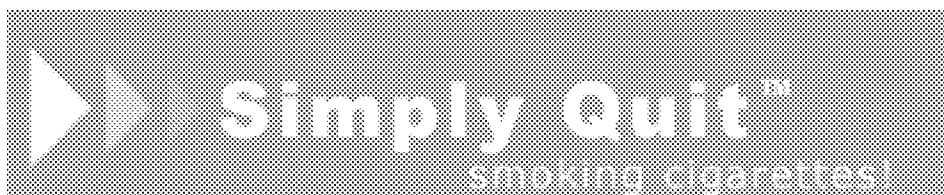
THE DEADLY LEGACY

SQ Kit

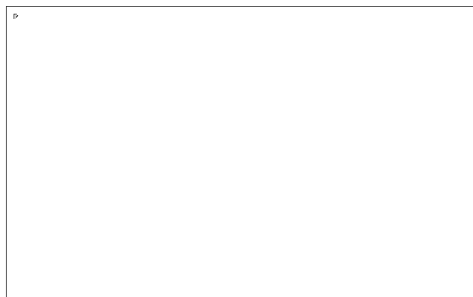
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CrewClean™
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Simply Quit™ smoking without drugs, physicians, hypnosis or other costly treatments



The Simply Quit™ Kit Includes a SQ Simulated Cigarette and a Step-By-Step Quit Smoking Guide



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We have created a simple yet unique program that we are confident will help you quit smoking within a short period of time.

- No Drugs!
- No Discomfort!
- No Nicotine!
- Lasts Up to 1 Year!
- No Side Effects!
- 100% Guaranteed!
- No Prescription!
- Smokeless!
- No Weight Gain!
- Made in USA!

Most smokers fail at their attempts to quit because they can't control their psychological addiction (the actual hand-to-mouth ritual) and the craving for cigarettes. SimplyQuit™ gives you control.

When you feel the need to smoke just inhale and lose your cravings. You don't light a cigarette, just inhale like you would a real cigarette. You usually enjoy but without the danger. SimplyQuit™ makes Simply Quit™ a miracle. SimplyQuit™



Simply Quit™ Quit Smoking Kit

Simply Quit™ is Drug and Nicotine free.

FDA Approved Materials

Simply Quit™ (SQ) Simulated Cigarettes replace the oral addiction caused by smoking cigarettes.

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absolutely harmless. Great to use in n
like offices, airplanes, and even hospi

If you really want to quit we will help.
confident in our product.

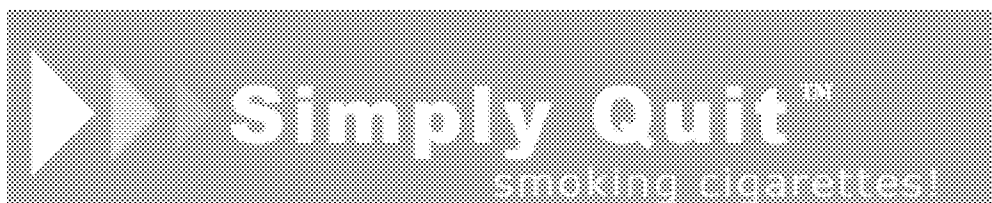
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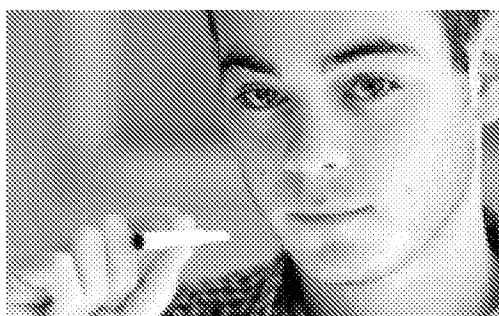
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Simply Quit™ smoking without drugs, physicians, hypnosis or other costly treatments!



If you don't have Real Power, you can't quit smoking.

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- **No Drugs!**
- **No Nicotine!**
- **No Side Effects!**
- **No Prescription!**
- **No Weight Gain!**
- **No Loss of Taste!**
- **No Loss of Control!**
- **No Loss of Power!**
- **No Loss of Real Power!**
- **No Loss of Control!**
- **No Loss of Power!**
- **No Loss of Real Power!**

Most smokers fail at their attempts because they can't control their psychological addiction (the actual hand-to-mouth craving for cigarettes. SimplyQuit™ control.

When you feel the need to smoke just use SimplyQuit™ and lose your cravings. You can quit smoking without any of the



Simply Quit™ Quit Smoking Kit

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FDA Approved Materials

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Patent Pending. Made In USA.

Order Now

Quit™, just inhale like you would a what you usually enjoy but without what makes Simply Quit™ a miracle absolutely harmless. Great to use in areas like offices, airplanes, and even

If you really want to quit we will help you be confident in our product.

For a Limited Time Only: We offer a Step-By-Step Quit Smoking Guide with the purchase of a simulated

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We have created a simple yet unique program that we are confident will help you effortlessly quit smoking within a short time.

- | | |
|---------------------------|---------------|
| • No Drugs! | • No |
| • No Nicotine! | • Last |
| • No Side Effects! | • year |
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| | • Mac |

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Quit™ and lose your cravings. You can quit smoking with Simply Quit™, just inhale like you would a cigarette. Simply Quit™ is what you usually enjoy but without the harmful chemicals. Simply Quit™ is what makes Simply Quit™ a miracle. Simply Quit™ is absolutely harmless. Great to use in public areas like offices, airplanes, and even at home.

If you really want to quit we will help you. We are confident in our product.

For a Limited Time Only: We offer a Free Step-By-Step Quit Smoking Guide with the purchase of a simulated cigarette.

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Exhibit 9

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

Moore Patents

794 Los Robles Avenue
Palo Alto, CA 94306
www.moorepatents.com

Cynthia R. Moore, Ph.D., J.D.
David D. Dreyfuss, Sc.D.

PHONE: 650-565-8185
FACSIMILE: 650-493-1993

Facsimile Cover Sheet

To: Janis Long**From:** Cynthia Moore**Fax:** 1-571-273-9573**Pages:** 5**Phone:** 1-571-272-9573**Date:** 2/5/2008**Re:** copy of Office Action 78/085086**CC:**☒ **Urgent**☐ **For Review**☐ **Please Comment**☐ **Please Reply**☐ **Please Recycle**

Dear Examiner Long,

Thank you for your call today discussing the status of the above-referenced trademark application and indicating that the petition will likely be granted and the application reinstated for further examination. As you requested, a copy of the original Office Action dated Dec. 3, 2001 is attached for your records.

Please let me know if you require any additional information or assistance.

Respectfully submitted,



Cynthia Moore

PLEASE NOTE: This facsimile, including any attached pages, may include privileged, confidential and/or inside information. Any distribution or use of this communication by anyone other than the intended recipient(s) is strictly prohibited and may be unlawful. If you are not the intended recipient, please notify the sender by calling the phone number above and then dispose of the pages. Thank you.

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO. 78/085086 GOLD, ELY		APPLICANT		PAPER NO.
MARK SIMPLYQUIT (STYLIZED)				
ADDRESS ELY GOLD 23679 calabasas rd. suite 216 calabasas CA 91302		ACTION NO. 01	ADDRESS: Commissioner for Trademarks 2900 Crystal Drive Arlington, VA 22202-3513 www.uspto.gov	
		MAILING DATE 12/03/01	If no fees are enclosed, the address should include the words "Box Responses - No Fee."	
		REF. NO.	Please provide in all correspondence: Date, serial number, mark and applicant's name. Mailing date of this Office action. Examining Attorney's name and office number. Telephone number and ZIP code.	

FORM PTO-1528 (5-90)

U.S. DEPT. OF COMM. PAT. & TM OFFICE

A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID ABANDONMENT. For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.

RE: Serial Number: 78/085086

The assigned examining attorney has reviewed the referenced application and determined the following.

Search Results

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 1105.01.

Applicant Must Amend Identification of Goods

The identification of goods is unacceptable as indefinite because it does not sufficiently specify the goods. TMEP section 804. Specifically, the phrase "simulated cigarette" does not sufficiently indicate the nature or purpose of the goods. For example, "cigarettes containing tobacco substitutes not for medical purposes" are classified in class 034, whereas "cigarettes containing tobacco substitutes for medical purposes" would be in class 010. The applicant must further describe the purpose and contents of its "simulated cigarettes."

78/085086

-2-

The identification is also unacceptable as too broad because it includes goods that could be classified in multiple international classes. TMEP section 804. Specifically, substitute cigarettes for medical purposes are in class 010 whereas those not for medical purposes are in class 034. If the applicant amends the identification to list goods/services in multiple international classes, it must comply with the requirements for multiple class applications, listed below.

The examining attorney suggests the following identification, which the applicant may adopt, if accurate:

Smokers' articles, namely, cigarettes containing tobacco substitutes not for medical purposes IC 034

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(a); TMEP section 804.09. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

** The PTO's Acceptable ID Manual is available on the Patent and Trademark Office's home page at www.uspto.gov. This manual includes explanations and notices of classification policy that may be beneficial to the applicant when amending the identification of goods.

Multi-Class Requirements

If the applicant prosecutes this application as a combined, or multiple-class, application, the applicant must comply with each of the following:

- (1) The applicant must specifically identify the goods in each class and list the goods by international class with the classes listed in ascending numerical order. TMEP section 1113.01.
- (2) The applicant must submit a filing fee for each international class of goods not covered by the fee already paid. 37 C.F.R. Sections 2.6(a)(1) and 2.86(b); TMEP sections 810.01 and 1113.01. The fee for filing a trademark application is \$325 for each class.
- (3) The applicant must submit:
 - (a) dates of first use and first use in commerce and one specimen for each class that includes goods or services based on use in commerce under Trademark Act Section 1(a). The dates of use must be at least as early as the filing date of this application. 37 C.F.R. Sections 2.34(a)(1) and 2.86(a), and the specimen(s) must have been in use in commerce at least as early as the filing date of the application, and/or
 - (b) a statement of a bona fide intention to use the mark in commerce on or in connection with all the goods or services specified in each class that includes goods or services based on a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), where such statement was not included for the goods or services in the original application.

78/085086

-3-

- (4) The applicant must submit an affidavit or a declaration under 37 C.F.R. Section 2.20 signed by the applicant to verify (3) above. 37 C.F.R. Sections 2.59(a) and 2.71(c).

Substitute Specimen Required

The specimen is unacceptable as evidence of actual trademark use because it consists merely of the applicant's mark printed on a blank sheet of paper, rather than showing the mark used on the goods or on the packaging for the goods, as is required. Therefore, the applicant must submit a new specimen showing the mark as used in commerce on the goods or on the packaging for the goods. 37 C.F.R. Section 2.56. Examples of acceptable specimens are tags, labels, instruction manuals, containers or photographs that show the mark on the goods or packaging.

In addition, the applicant must verify, with an affidavit or a declaration under 37 C.F.R. Section 2.20, that the substitute specimen was in use in commerce at least as early as the filing date of the application. *Jim Dandy Co. v. Siler City Mills, Inc.*, 209 USPQ 764 (TTAB 1981); 37 C.F.R. Section 2.59(a); TMEP section 905.10.

The statement supporting use of the substitute specimen must read as follows:

The substitute specimen was in use in commerce at least as early as the filing date of the application.

The applicant must sign this statement either in affidavit form or with a declaration under 37 C.F.R. Section 2.20. The following is a properly worded declaration under 37 C.F.R. Section 2.20. At the end of the response, the applicant should insert the declaration signed by someone authorized to sign under 37 C.F.R. Section 2.33(a).

The substitute specimen was in use in commerce at least as early as the filing date of the application.

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that the facts set forth in this application are true; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

(Signature)

(Print or Type Name and Position)

(Date)

Guidelines for Responding to Office Actions

No set form is required for response to this Office action. The applicant must respond to each point raised. The applicant should simply set forth the required changes or statements and request that the Office enter them. The applicant must sign the response. In addition to the identifying

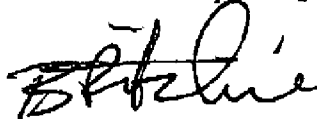
78/085086

-4-

information required at the beginning of this letter, the applicant should provide a telephone number to speed up further processing.

In all correspondence to the Patent and Trademark Office, the applicant should list the name and law office of the examining attorney, the serial number of this application, the mailing date of this Office action, and the applicant's telephone number.

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.



Branden Ritchie
Examining Attorney
Law Office 110
703.308.9110 x135

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:
Ely GOLD

Law Office: 110

Serial No.: 78085086

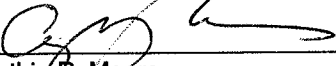
Filing Date: September 22, 2001

Mark: ***SimplyQuit***

Commissioner for Trademarks
PO Box 1451
Alexandria, VA 22313-1451

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451 on the date shown below:


Cynthia R. Moore
Oct. 3, 2007

REQUEST FOR RECONSIDERATION UNDER 37 C.F.R. § 2.66(f)

Sir:

This submission is in response to the "Petition to Revive Denied," dated August 31, 2007. Applicant hereby requests reconsideration of the denial in accordance with 37 C.F.R. § 2.66(f), which states that if the Director denies a petition, the applicant may request reconsideration, if the applicant: (1) files the request within two months of the mailing date of the decision denying the petition; and (2) pays a second petition fee under § 2.6.

As this response is submitted within two months from the mailing date of the Denial dated August 31, 2007, and is accompanied by the fee due under 37 C.F.R. § 2.6, this Request for Reconsideration is timely filed.

Reconsideration is respectfully requested in view of the following remarks:



10-09-2007

REMARKS

Applicant acknowledges with appreciation the implicit acknowledgement of Office error with respect to the failure of the Office to act on the Petition to Revive dated August 30, 2002, and also the completeness and timeliness of said Petition. The Petition has now been denied on the grounds that Applicant had an obligation of diligence to prompt the Office to act if no action was taken within one year. Applicant respectfully traverses the grounds for the denial and requests reconsideration of the denial of the petition.

The pertinent facts in the present case are as follows:

1. A Notice of Abandonment was mailed on August 19, 2002.
2. A Petition to Revive an Abandoned Application was timely mailed by certified mail on August 26, 2002 and recorded as received in the Office on August 30, 2002, which is within 2 months of the date of the Notice of Abandonment, as required by 37 C.F.R. § 2.66(a).
3. In accordance with 37 C.F.R. § 2.66(b), the Petition included: (1) the required fee of \$100, (2) a Statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the response on or before the due date was unintentional, and (3) the proposed Response to the outstanding Office Action.
4. Confirmation was received of receipt of the mail by the Office. The Office deposited the check and stamped the amount received on the Response, and entered the papers into the application file as "paper received."
5. Applicant called the Office to confirm receipt of the Petition to Revive after it was submitted, was told that all documents were received and was guided by the Office to check their website to confirm receipt.
6. From August 6, 2002 through July 9, 2007, no action on the Petition was received by Applicant or posted on the Trademark Document Retrieval site. From time to time Applicant checked the status of his Application and could see that the documents were still posted on the website but no action had been taken.
7. Applicant, not being knowledgeable regarding how long the Office should take to respond to a Petition, waited patiently for a response while continuing to use the Mark in the course of normal business.
8. Applicant became aware on July 9, 2007 that his application was still marked "dead"

on the Trademark Document Retrieval site, and that his trademark had been awarded to another entity, immediately called the Office and was told that the petition had not been processed and granted due to Office error (Casandra, reference #1-89912332).

9. Applicant submitted a Request for Reinstatement due to Office Error on July 18, 2007, and submitted copies of the canceled check, Statement and the proposed Response with a request that the Office reinstate his application, act on the properly filed petition and reinstate the application.

10. Applicant filed a Notice of Opposition on August 22, 2007 opposing the registration of his mark to the other entity (Opposition No. 91179090).

11. The Office responded to the Request for Reinstatement with a "Petition to Revive Denied" dated August 31, 2007, where it acknowledged receipt of the Petition to Revive dated August 30, 2002, but denied the petition alleging a lack of diligence on the part of Applicant.

Applicant respectfully traverses the grounds for the denial for the following reasons:

I. The Petition received by the Office on August 30, 2002 should have been granted as a matter of right in accordance with 37 C.F.R. § 2.66. Denial of the Petition is in contradiction of Trademark Office rules and policy.

The relevant sections of 37 C.F.R. § 2.66 are as follows:

- (a) The applicant may file a petition to revive an application abandoned because the applicant did not timely respond to an Office action or notice of allowance, if the delay was unintentional. The applicant must file the petition:
 - (1) Within two months of the mailing date of the notice of abandonment; or
 - (2) Within two months of actual knowledge of the abandonment, if the applicant did not receive the notice of abandonment, and the applicant was diligent in checking the status of the application every six months in accordance with §2.146(i).
- (b) The requirements for filing a petition to revive an application abandoned because the applicant did not timely respond to an Office action are:
 - (1) The petition fee required by §2.6;
 - (2) A statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the response on or before the due date was unintentional; and
 - (3) Unless the applicant alleges that it did not receive the Office action, the proposed response.

- (e) The Director *will* grant the petition to revive if the applicant complies with the requirements listed above and establishes that the delay in responding was unintentional. [Emphasis added].

There is no discretion given by the rule to the Office to deny a timely filed Petition to Revive, if it meets the requirements stated above. To deny Applicant's timely filed Petition to Revive is to act in contradiction to the rules governing petitions to revive and USPTO policy, and creates uncertainty and unpredictability in relations with the Office as well as with respect to the status of other trademark applications being examined by the Office. Third parties checking the status of abandoned applications on the USPTO website can see whether a Petition to Revive has been filed, and are on notice that an applicant is seeking to revive his application if it has become abandoned. To deny properly filed petitions is to create chaos and uncertainty, resulting in costly errors to applicants and unnecessary conflicts between applicants seeking registration of the same marks. Therefore, the Office should grant Applicant's petition, as a nondiscretionary matter and for consistency and predictability in dealings with the Office.

II. The Office alleged that Applicant lacked diligence when it denied the Petition to Revive dated August 30, 2002, and cited 37 C.F.R. § 2.146(i) in support of this allegation.

In response, **Applicants submit that the Office has misapplied the requirement for diligence in the present instance.** The rule cited in support of the contention that Applicant lacked diligence, 37 C.F.R. § 2.146(i), states (in the version in effect prior to May 2004):

Where a petitioner seeks to reactivate an application or registration that was abandoned or cancelled because papers were lost or mishandled, the Commissioner may deny the petition if the petitioner was not diligent in checking the status of the application or registration. To be considered diligent, the applicant must check to status of the application or registration within one year of the last filing or receipt of a notice from the Office for which further action by the Office is expected.

The relevant section of 37 C.F.R. § 2.66 governing petitions to revive is as follows:

- (a) The applicant may file a petition to revive an application abandoned because the applicant did not timely respond to an Office action or notice of allowance, if the delay was unintentional. The applicant must file the petition:
 - (1) Within two months of the mailing date of the notice of abandonment; or
 - (2) **Within two months of actual knowledge of the abandonment, if the applicant did not receive the notice of abandonment, and the applicant was**

diligent in checking the status of the application every six months in accordance with §2.146(i). [Emphasis added].

Both 37 C.F.R. §§ 2.146(i) and 2.66(a)(2) relate to the diligence required of Applicant **before** filing a petition. To have a petition considered by the Office **when Applicant did not receive a notice of abandonment of his application**, Applicant must have been diligent in checking the status of his application in order to obtain actual knowledge of abandonment in the event papers are not received by either Applicant or the Office.

However, in the instant situation, Applicant did receive the Notice of Abandonment and responded with a timely filed Petition to Revive dated August 30, 2002 and associated documents for the required response to the Office Action, as discussed above. There was no need for Applicant to be diligent in ascertaining the need to file the Petition to Revive, as **actual knowledge of the abandonment was provided by receipt of the Notice of Abandonment**. Therefore, Applicant's petition should be granted, whether or not Applicant acted with diligence **after** filing the Petition, because the diligence requirements were met prior to filing, as required by the rule.

III. The Office alleges that the Petition to Revive was denied because Applicant was not diligent, and further argues that applicants are expected to keep themselves informed of the status of matters pending before the office, because third parties rely on the information in the records of the Office (citing TMEP §§ 1705.04, 1712.01 and 1714.01(d)). The Office further argues that since it is reasonable to expect some notice from the Office about a pending matter well within one year of the filing or receipt of any document, a party who has not received the expected action within that time frame should be on notice that the filing may have been lost.

Applicants respectfully disagree with these grounds for denying the Petition to Revive as well. **Applicant was diligent in checking the status of his application and acted promptly to request corrective action once the need for such action was apparent**. Applicant was directed by a USPTO representative to the USPTO website to confirm receipt of his Petition to Revive dated August 30, 2002, and did so. From time to time Applicant went to the website to again check the status of his application as instructed. The continued "abandoned" status of the application was no cause for concern for Applicant, as Applicant knew the Office to be in

possession of the required filed papers. **Applicant could not have been on notice that the filing may have been lost** because the check had been stamped as received and had been deposited by the USPTO, he could see that the papers were viewable on the USPTO website and that the application was assigned to Law Office 110, all of which made it appear that everything was in order and the application was awaiting its turn to receive attention. The filing clearly had not been “lost”; the Office was merely waiting to act on papers that it acknowledged to be in its possession by posting the papers and depositing the check. While it is “reasonable” to expect the Office to respond within one year, there is no law or rule that mandates such response, nor is there any law or rule that requires the Applicant to prompt the Office to act if no response is made within one year (see IV below). No further corrective action appeared necessary, as the required corrective action had already been taken.

In fact, **Applicant was put on notice that there was a problem only when he checked the status of his application and realized that an application for the same mark had been applied for and erroneously granted to a different entity.** This was the first notice Applicant had that the USPTO was apparently ignoring his Petition to Revive, his application and his prior use of the mark. At that time, Applicant acted promptly to file a Request for Reinstatement asking the USPTO to grant his Petition to Revive of August 30, 2002, well within the two month period required once Applicant had actual notice.

Therefore, **Applicant was diligent in taking corrective action once the need for such action became apparent.** Prior to the granting of Applicant’s mark to another, Applicant had no reason to believe the USPTO was unaware of or ignoring his application and his prior use of the mark, and of the Petition to Revive filed to place the application in active status and respond to the pending Office Action.

Further, the TMEP sections cited by the Office do not support the Office’s contention that Applicant was not diligent. TMEP § 1705.04 describes the time limits for filing various responses with the Office, and points out that a Petition to Revive must be filed within two months of the mailing date of a Notice of Abandonment, which was met by Applicant’s Petition to Revive dated August 30, 2002. TMEP § 1712.01 describes the time limits for filing a Request for Reinstatement, and points out that a Request for Reinstatement must be filed within two months of the mailing date of a Notice of Abandonment, or within two months of the date

Applicant had actual knowledge that his application was abandoned, all of which are either not relevant or were met by Applicant. TMEP § 1714.01(d)) describes the time limits and requirement for diligence in filing a Petition to Revive under 37 C.F.R. § 2.66(a), which as discussed above, was also met by Applicant.

Therefore, the denial of Applicant's Petition to Revive due to a lack of diligence was improper and should be withdrawn, and the Petition should be granted.

IV. Further, Applicant was in fact diligent and had no duty to request corrective action sooner under the rule as alleged by the Office in the Denial of the Petition to Revive. In the Denial of the Petition to Revive, the Office alleges that TMEP § 1705.05 requires that a petitioner be diligent by inquiring as to the status of a pending matter within one year of filing or receipt of a document for which further action by the USPTO is expected. The definition of diligence in § 1705.05 is provided by 37 C.F.R. § 2.146(i), which was amended in September 2003 to clarify the definition of diligence and reduce the time period required to show diligence from 12 months to 6 months effective May 2, 2004. The rule now states:

(i) Where a petitioner seeks to reactivate an application or registration that was abandoned, cancelled or expired because papers were lost or mishandled, the Director may deny the petition if the petitioner was not diligent in checking the status of the application or registration. To be considered diligent, a petitioner must:

- (1) During the pendency of an application, check the status of the application every six months between the filing date of the application and issuance of a registration;
- (2) After registration, check the status of the registration every six months from the filing of an affidavit of use or excusable nonuse under section 8 or 71 of the Act, or a renewal application under section 9 of the Act, until the petitioner receives notice that the affidavit or renewal application has been accepted; and
- (3) **If the status check reveals that the Office has not received a document filed by the petitioner, or that the Office has issued an action or notice that the petitioner has not received, the petitioner must promptly request corrective action.** [Emphasis added].

There is no language in this rule in its previous form or as amended which requires an applicant to request corrective action with the Office when it fails to act on a received document within any particular time period. Applicant submits that the diligence requirement does not mandate or even contemplate that Applicant take action when it would be inappropriate for

Applicant to take action, that is, when Applicant ascertains that papers have been received and posted on the TDR website, and that no papers have been mailed from the Office to Applicant, but not received. **The rule specifically calls for the Applicant to promptly request corrective action only if a status check reveals that a document was not received by either the Office or the Applicant.** No such event occurred in the present instance, and therefore Applicant had no duty to request corrective action sooner under the rule as alleged by the Office in the Denial of the Petition to Revive.

In the instant situation, it would be absurd to accuse Applicant of a lack of diligence when in fact it is the USPTO that was not diligent in failing to take the next step in prosecution. Applicant respectfully submits that the diligence requirement was never meant to require that Applicants tell the Office how or when to carry out their responsibilities in acting on trademark applications and responses, absent the circumstances clearly laid out in 37 C.F.R. § 2.66 and TMEP § 1705.05. Therefore, Applicant respectfully requests reconsideration of the denial of his petition, and contends that the Petition to Revive should be granted.

V. Further, Applicant's Request for Reinstatement should have been granted and the application restored to active status. According to 37 C.F.R. § 2.146(d), a request for reinstatement must be filed within two months of the mailing date of the notice of abandonment **or, if the applicant has not received a notice of abandonment, within two months of the date the applicant or the applicant's attorney had actual knowledge that the application was abandoned.** If the applicant did not receive a notice of abandonment, the applicant must have been duly diligent in monitoring the status of the application, or the request for reinstatement will be denied. To be duly diligent, the applicant must check the status of a pending application every six months between the filing date of the application and issuance of a registration.

As explained above, Applicant was diligent, and took corrective action in filing the Request for Reinstatement promptly once put on notice that action was needed, well within the two month time period for filing the Request.

VI. Finally, even if the Office is correct in imposing a diligence requirement on

Applicant after the Petition to Revive was timely filed and denying the Petition to Revive and the Request for Reinstatement, Applicant requests that the rules be waived pursuant to 37 C.F.R. §§ 2.146(a)(5) and 2.148 and TMEP § 1708. These rules state that “the Director may waive any provision of the rules that is not a provision of the statute, when (1) an extraordinary situation exists, (2) justice requires, and (3) no other party is injured.”

In the instant situation, Applicant respectfully contends that extraordinary circumstances exist in the apparent failure of the Office to act on Applicant’s original Petition to Revive dated August 30, 2002, in that Applicant knew that the Office was safely in possession of his Petition and that the application was assigned to Law Office 110, and believed that the Office would act on it in due course. Applicant had no reason to believe that any further action on his part was required, as the information available from the online status check indicated that everything appeared to be in order. The evidence supports Applicant’s reasonable belief that the prosecution of his trademark application was under the control and authority of the USPTO, and Applicant had no expectation or belief that further action on his part was welcome or even allowed.

According to the Office, “oversights and inadvertent errors that could have been avoided [by Applicant] with the exercise of reasonable care” are not “extraordinary circumstances.” See TMEP § 1708. However, in the instant situation, there is nothing that Applicant could have done to avoid the “oversights and inadvertent errors” **performed by the Office**, given the information available when he performed a status check. Accordingly, Applicant’s situation should be considered an “extraordinary situation.” Therefore, Applicant contends that the receipt in the Office of his Petition to Revive, but subsequent failure of the Office to act on it, was an extraordinary circumstance beyond Applicant’s control, and that Applicant should not be penalized for circumstances beyond his control.

Secondly, justice requires that the Office grant Applicant’s original Petition to Revive. Applicants rely on the Office examining applications according to the stated rules. Applicants have a right to expect the Office not to arbitrarily and capriciously modify the application of the rules without notice or deny Applicant’s requests using novel interpretations to the rules. 37 C.F.R. § 2.66(e) states that the Petition to Revive **will** be granted if timely filed, and it would be unjust for the Office to choose to ignore this mandate because they want to cover up their own mistake in failing to act on the petition. Further, third parties checking the status of abandoned

applications on the USPTO website can see whether a Petition to Revive has been filed, and are on notice that an applicant is seeking to revive his application if it has become abandoned.

Applicants searching the trademark database and finding an abandoned application for which a Petition to Revive has been filed have every expectation that the application will be revived in accordance with 37 C.F.R. § 2.66(e), and will choose not to pursue a trademark application on that mark. Denying properly filed petitions creates chaos and uncertainty, in that applicants will not know whether an application will be revived or not, and may make costly or erroneous filing decisions, as occurred here.

In addition, the Denial of the Petition to Revive dated August 31, 2007 states that Applicant may file a new application. However, there is an additional fee for filing a new application, and it would be unjust to require Applicant to pay yet additional fees to file a new trademark application when the previously filed trademark application should have been revived and examined. In addition, justice requires that the Office waive the petition fee for filing this Request for Reconsideration, since the petition fee paid on August 30, 2002 was deposited by the Office but the petition was not acted upon, resulting in the application remaining abandoned and the mark being erroneously granted to another entity, necessitating the filing of a Notice of Opposition and incurring additional expense and aggravation to Applicant in rectifying matters. Therefore, Applicant respectfully submits that justice requires that the Office act in accordance with its own rules to provide predictability to Office procedures, and contends that justice requires that Applicant's application be revived and examined.

Thirdly, Applicant contends that no other party is injured by the Office granting Applicant's Petition to Revive. What injury to third parties is possible has already occurred, as another entity was erroneously granted registration of Applicant's mark, and Applicant was forced to file a Notice of Opposition opposing the registration of his mark to that entity. As Applicant can show an earlier first use in commerce of the trademark at issue, and therefore has superior rights to register and use the mark, the injury is unavoidable whether or not the Office grants Applicant's Petition to Revive. Further, any injury could have been avoided had interested parties performed their own investigation and chosen a different mark. Therefore, no other party will be injured by waiving the rules in the instant case and reviving Applicant's trademark application.

Therefore, Applicant contends that all three elements that would allow a waiver of the rules in this case have been satisfied, and for this additional reason, the Petition to Revive and Request for Reinstatement should be granted.

CONCLUSION

Applicant requests that the Office reconsider the Denial of the Petition to Revive under 37 C.F.R. § 2.66(f), and that the Office comply with its own rules under 37 C.F.R. § 2.66(e), which mandates that Applicant's Petition to Revive dated August 30, 2002 be granted. In addition, Applicant has shown that the diligence requirements of 37 C.F.R. §§ 2.146(i) and 2.66(a)(2) were, in fact, satisfied. Should the Office continue to disagree that Applicant was diligent and refuse to revive his application, Applicant further submits that the requirements for a waiver of the rules have been satisfied.

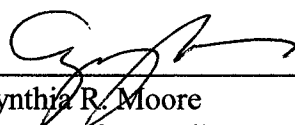
Accordingly, Applicant respectfully requests that the Office reconsider the Denial of the Petition to Revive, enter and grant the Petition as required by 37 C.F.R. § 2.66(e), revive the Application, and enter the Response for further action.

This Request is accompanied by the fee due under 37 C.F.R. § 2.6.

If the Office has any questions concerning this communication, or would like to discuss the application, or other pertinent matters, they are welcome to contact the undersigned attorney at (650) 565-8185.

Respectfully submitted,

By:


Cynthia R. Moore
Attorney for Applicant
(650) 565-8185

Dated: October 3, 2007
794 Los Robles Avenue
Palo Alto, CA 94306

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/085086

APPLICANT: GOLD, ELY

78085086

CORRESPONDENCE ADDRESS:

ELY GOLD
23679 calabasas rd.
suite 216
calabasas CA 91302

RETURN ADDRESS:

Commissioner for Trademarks
P. O. Box 1451
Alexandria, VA 22313-1451

MARK: SIMPLYQUIT

MAILING DATE

August 31, 2007

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

Please provide in your correspondence:

CORRESPONDENT'S EMAIL ADDRESS:

sago2000@hotmail.com

1. Filing date, serial number, mark and applicant's name.
2. Date of this Notice.
3. Attn: Petitions Office
4. Your telephone number and e-mail address.

PETITION TO REVIVE DENIED

Serial Number 78/085086

This will acknowledge receipt on July 18, 2007 of a copy of a Petition to Revive submitted on August 30, 2002.

Trademark Rule 2.146(i), 37 C.F.R. 2.146(i), provides the following:

Where a petitioner seeks to reactivate an application or registration that was abandoned or cancelled because papers were lost or mishandled, the Commissioner may deny the petition if the petitioner was not diligent in checking the status of the application or registration. To be considered diligent, the applicant must check the status of the application or registration within one year of the last filing or receipt of a notice from the Office for which further action by the Office is expected.

Applicants are expected to keep themselves informed of the status of matters pending before the Office. The Office expects applicants to be diligent in prosecuting their applications because third parties rely on the information in the records of the Office. *See* TMEP §§1705.04, 1712.01 and 1714.01(d). Since it is reasonable to expect some notice from the Office about

a pending matter well within one year of the filing or receipt of any document, a party who has not received the expected action within that time frame should be on notice that the filing may have been lost.

In petitions filed prior to May 2, 2004, a petitioner is considered diligent if the petitioner inquired as to the status of a pending matter within one year of the filing or receipt of a document for which further action by the USPTO is expected.^[1] TMEP §1705.05.

In this case, Petitioner has not been duly diligent in monitoring the status of its application. The Petition to Revive was submitted on August 30, 2002, but no further action on the application was taken until a copy of the request was filed with the Office on July 18, 2007, almost five years later. Therefore, although the Petition to Revive was timely, the applicant was not duly diligent and the application remains abandoned.

Any fee(s) filed with the Petition to Revive for Reinstatement will be refunded in due course. Applicant may file a new application.

/Deborah D Mays/

Paralegal Specialist

Office of Petitions

Phone: (571) 272-9575

Fax:(571) 273-9575

E-mail: Deborah.Mays@uspto.gov

To check the status of your application at any time, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov/>

For general and other useful information about trademarks, you are encouraged to visit the Office's web site at <http://www.uspto.gov/main/trademarks.htm>

1 _____

^[1] In petitions filed on or after May 2, 2004, to be considered diligent, a petitioner must: (1) check the status of a pending application every six months between the filing date of the application and issuance of a registration; (2) check the status of a registration every six months after filing an affidavit of use or excusable nonuse under §8 or §71 of the Trademark Act, or a renewal application under §9 of the Trademark Act, until the petitioner receives notice that the affidavit or renewal application has been accepted; and (3) promptly request corrective action in writing where necessary. 37 C.F.R. §2.146(i). See Exam Guide 1-03, Sec. IV (TMOG Dec. 16, 2003, available at <http://www.uspto.gov/web/offices/com/sol/og/2003/week50/patgui1.htm>).

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:
Ely GOLD

Serial No.: 78085086

Law Office: 110

Filing Date: September 22, 2001

Mark: ***SimplyQuit***

Commissioner for Trademarks
PO Box 1451
Alexandria, VA 22313-1451

REQUEST FOR REINSTATEMENT DUE TO OFFICE ERROR

Sir:

In accordance with TMEP § 1712.01, Applicant hereby requests reinstatement and continued examination of the above-captioned application. The Petition received by the Office on August 30, 2002 should have been granted as a matter of right in accordance with 37 C.F.R. § 2.66. Applicant respectfully requests reinstatement of the application due to Office error.

The relevant sections of 37 C.F.R. § 2.66 are as follows:

(a) The applicant may file a petition to revive an application abandoned because the applicant did not timely respond to an Office action or notice of allowance, if the delay was unintentional. The applicant must file the petition:

- (1) Within two months of the mailing date of the notice of abandonment; or
- (2) Within two months of actual knowledge of the abandonment, if the applicant did not receive the notice of abandonment, and the applicant was diligent in checking the status of the application every six months in accordance with §2.146(i).

(b) The requirements for filing a petition to revive an application abandoned because the applicant did not timely respond to an Office action are:

- (1) The petition fee required by §2.6;
- (2) A statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the response on or before the due date was unintentional; and
- (3) Unless the applicant alleges that it did not receive the Office action, the proposed response.



07-18-2007

U.S. Patent & TMO/TM Mail Rcpt Dt. #01

(e) The Director *will* grant the petition to revive if the applicant complies with the requirements listed above and establishes that the delay in responding was unintentional.

(Emphasis added).

The pertinent facts in the present case are as follows:

1. A Notice of Abandonment was mailed on August 19, 2002.
2. A Petition to Revive an Abandoned Application was timely mailed on August 26, 2002 and recorded as received in the Office on August 30, 2002, which is within 2 months of the date of the Notice of Abandonment, as required by 37 C.F.R. § 2.66(a).
3. In accordance with 37 C.F.R. § 2.66(b), the Petition included: (1) the required fee of \$100, (2) a Statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the response on or before the due date was unintentional, and (3) the proposed Response to the outstanding Office Action. Copies of the canceled check, Statement and Response are submitted herewith.
4. The Office deposited the check and stamped the amount received on the Response.
5. The Office entered the papers into the application file as "paper received."
6. To date, no action on the Petition has been received by Applicant or posted on the Trademark Document Retrieval site.
7. Applicant, not being knowledgeable regarding how long the Office should take to respond to a Petition, waited patiently for a response while continuing to use the Mark in the course of normal business.
8. Applicant became aware on July 9, 2007 that his application was marked "dead" on the Trademark Document Retrieval site, immediately called the Office and was told that the petition had not been processed and granted due to Office error (Casandra, reference #1-89912332), and now submits this Request for Reinstatement due to Office Error.

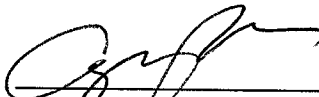
Accordingly, Applicant respectfully requests that the Office immediately enter and grant the Petition as required by 37 C.F.R. § 2.66(e), revive the Application, and enter the Response for further action. No fee is believed due for

this Request.

If the Office has any questions concerning this communication, or would like to discuss the application, or other pertinent matters, they are welcome to contact the undersigned attorney at (650) 565-8185.

Respectfully submitted,

By:



Cynthia R. Moore
Attorney for Applicant
Registration No. 46,086

Dated: July 16, 2007
794 Los Robles Avenue
Palo Alto, CA 94306
(650) 565-8185

Ely Gold
23679 Calabasas Rd. Ste. 216
Calabasas, CA 91302
(818) 224-4058

78/085086

United States Patent and Trademark Office
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA US 22202

I am very sorry. One of my associates received the Office Action from the USPTO and didn't realize that it needed a response so he just filed it away, he simply thought it was just confirmation of our trademark and did not bother to show me. I apologize for any inconvenience I have caused you and I would like to continue with my request for revival of my application. Again, I apologize, I unintentionally did not respond to the Office Action document.

Sincerely,


Ely Gold

✓

TRADEMARK LAW OFFICE 10
Serial Number: 78/085086
Mark: SIMPLYQUIT (STYLIZED)

Please Place on Upper Right Corner
**of Response to Office Action ONLY **

Ely Gold
23679 Calabasas Rd. Ste. 216
Calabasas, CA 91302
(818) 224-4058

United States Patent and Trademark Office
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA US 22202

Reply to Office Action Mailed on 12-03-01

Identification of Goods

Smoker's articles, namely, cigarettes containing tobacco substitutes not for medical purposes IC 034.

Substitute Specimen Required

The substitute specimen is enclosed.

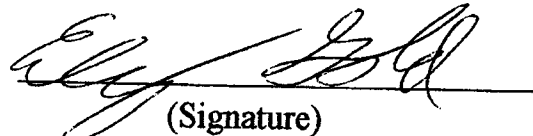
The substitute specimen was in use in commerce at least as early as the filing date of the application.

The undersigned, being of hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that the facts set forth in this application are true; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

09/04/2002 SWILSON 00000072 78085086

01 FC:375

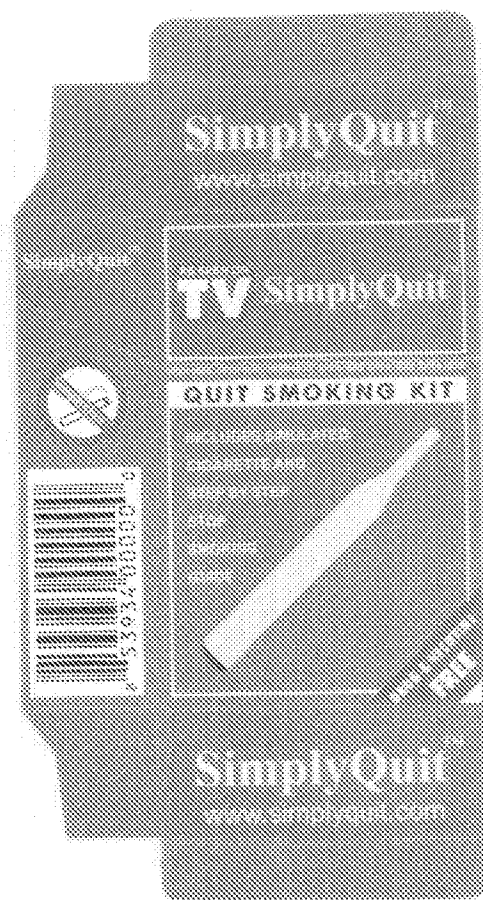
100.00 OP


(Signature)

Ely Gold
(Print or Type Name and Position)

8-26-2002

(Date)



[TDR Home](#)

Ely Gold
23679 Calabasas Rd. Ste. 216
Calabasas, CA 91302
(818) 224-4058

78/085086

United States Patent and Trademark Office
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA US 22202

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Sincerely,


Ely Gold

✓

Please Place on Upper Right Corner
**of Response to Office Action ONLY **

Ely Gold
23679 Calabasas Rd. Ste. 216
Calabasas, CA 91302
(818) 224-4058

United States Patent and Trademark Office
Commissioner for Trademarks
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Arlington, VA US 22202

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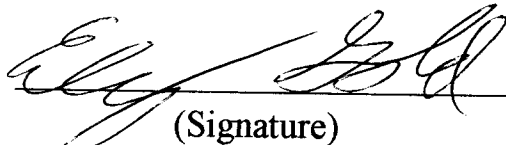
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09/04/2002 SWILSON 00000072 78085086

01 FC:375

100.00 OP


(Signature)

Ely Gold

(Print or Type Name and Position)

8-26-2002

(Date)

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www.simplyquit.com

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Side - 1

 <p>UNITED STATES PATENT AND TRADEMARK OFFICE</p>	<p>NOTICE OF ABANDONMENT ISSUE DATE: 08-19-2002</p>
<p>The trademark application identified below was abandoned because a response to the Office Action mailed on 12-03-2001 was not received within the 6-month response period.</p> <p>If the delay in filing a response was unintentional, you may file a petition to revive the application with a fee. If the abandonment of this application was due to USPTO error, you may file a request for reinstatement. Please note that a petition to revive or request for reinstatement must be received within two months from the issue date of this notice.</p> <p>For additional information, go to http://www.uspto.gov/teas/petinfo.htm. If you are unable to get the information you need from the website, call the Trademark Assistance Center at 703-308-9000.</p> <p>SERIAL NUMBER: 78085086 MARK: SIMPLYQUIT</p>	

Side - 2

<p>UNITED STATES PATENT AND TRADEMARK OFFICE COMMISSIONER FOR TRADEMARKS 2900 CRYSTAL DRIVE ARLINGTON, VA 22202-3513</p> <p>ELY GOLD 23679 CALABASAS RD STE 216 CALABASAS , CA 91302</p>	<p>FIRST-CLASS MAIL U.S POSTAGE PAID</p>
--	--

Drawing Page

Serial Number:

78085086

Applicant:

ely gold
23679 calabasas rd.
suite 216
calabasas CA USA 91302



Date of First Use:

09/15/2001

Date of First Use in Commerce:

09/21/2001

Goods and Services:

smoker's articles, namely simulated cigarette

Mark:

SimplyQuit



NO OCR



09-22-2001

SimplyQuit

Internet Transmission Date:

2001/09/22

Serial Number:

78085086

Filing Date:

2001/09/22



TRADEMARK APPLICATION

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

TOTAL FEES PAID: \$325

RAM SALE NUMBER: 105
RAM ACCOUNTING DATE: 20010924



NO OCR



09-22-2001

<SERIAL NUMBER> 78085086

<FILING DATE> 09/22/2001

<DOCUMENT INFORMATION>

<TRADEMARK/SERVICEMARK APPLICATION>

<VERSION 1.23>

<APPLICANT INFORMATION>

<NAME> ely gold
<STREET> 23679 calabasas rd.
<LN2> suite 216
<CITY> calabasas
<STATE> CA
<COUNTRY> USA
<ZIP/POSTAL CODE> 91302
<TELEPHONE NUMBER> 818 377 5046
<E-MAIL ADDRESS> sago2000@hotmail.com
<AUTHORIZE E-MAIL COMMUNICATION> Yes

<APPLICANT ENTITY INFORMATION>

<INDIVIDUAL: COUNTRY OF CITIZENSHIP> usa

<TRADEMARK/SERVICEMARK INFORMATION>

<MARK>

<TYPED FORM> No

* Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). *

<BASIS FOR FILING AND GOODS/SERVICES INFORMATION>

<USE IN COMMERCE: SECTION 1(a)> Yes

* Applicant is using or is using through a related company the mark in commerce on or in connection with the below-identified goods/services. (15 U.S.C. Section 1051(a), as amended.). Applicant attaches one SPECIMEN for each class showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services. *

<SPECIMEN> Yes

<SPECIMEN DESCRIPTION> repeated word simplyquit

<LISTING OF GOODS AND/OR SERVICES> smoker's articles, namely simulated cigarette

<FIRST USE ANYWHERE DATE> 09/15/2001

<FIRST USE IN COMMERCE DATE> 09/21/2001

<FEE INFORMATION>

<TOTAL FEES PAID> 325
<NUMBER OF CLASSES PAID> 1
<NUMBER OF CLASSES> 1

<LAW OFFICE INFORMATION>

* The USPTO is authorized to communicate with the applicant at the below e-mail address *

<E-MAIL ADDRESS FOR CORRESPONDENCE> sago2000@hotmail.com

<SIGNATURE AND OTHER INFORMATION>

* PTO-Application Declaration: The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

*

<SIGNATURE> /ely gold/
<DATE> 09/22/2001
<NAME> ely gold

<MAILING ADDRESS>

<LINE> ely gold
<LINE> 23679 calabasas rd.
<LINE> suite 216
<LINE> calabasas CA 91302

<CREDIT CARD INFORMATION>

<RAM SALE NUMBER> 105
<RAM ACCOUNTING DATE> 20010924

<SERIAL NUMBER INFORMATION>

<SERIAL NUMBER> 78/085086
<INTERNET TRANSMISSION DATE> Saturday, 09-22-2001 17:00:42 EDT
<TEAS STAMP>

USPTO-24507265-20010922170028540-78/085086-1236856c0af0750261c0e86186c806a413e-

CC-105-20010922170028540

E-MAIL ADDRESS FOR ACKNOWLEDGMENT> sago2000@hotmail.com

Drawing Page

Serial Number:

78085086

Applicant:

ely gold
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calabasas CA USA 91302



Date of First Use:

09/15/2001

Date of First Use in Commerce:

09/21/2001

Goods and Services:

smoker's articles, namely simulated cigarette

Mark:

SimplyQuit



NO OCR



09-22-2001

SimplyQuit

ORIGINAL SPECIMEN

Internet Transmission Date:

2001/09/22

Serial Number:

78085086

Filing Date:

2001/09/22

SimplyQuit
SimplyQuit
SimplyQuit
SimplyQuit

The applicant has submitted required color specimen.
The USPTO has printed only one copy of the specimen,
and extra copies can be produced in-house as needed.

SimplyQuit

SimplyQuit

SimplyQuit

SimplyQuit

Exhibit 10

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In The Matter of Application Serial No. 77/090,694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

Opposer,

V.

SIMPLYWELL, LLC,

Applicant.

Opposition No. 91179090

**APPLICANT'S ANSWERS TO OPPOSER'S
FIRST SET OF INTERROGATORIES**

TO: Elgo, Inc. by and through their attorney Cynthia R. Moore, Moore Patents, 794 Los Robles Avenue, Palo Alto, CA 94306.

COMES NOW Simplywell, LLC. (“Simplywell”), and, pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure and Trademark Rule 2.120, responds to Elgo, Inc.’s (“Elgo”) First Set of Interrogatories as follows.

GENERAL OBJECTIONS

1. By way of introduction, Simplywell has not yet completed its investigation of the facts in this matter, has not completed discovery, and has not completed trial preparation. Accordingly, Simplywell is providing its present responses herewith in a good faith effort to comply with Elgo's Interrogatories. Further investigation, discovery and trial preparation may lead to the discovery of additional information and facts. The following responses are made upon the basis of

information available to Simplywell at this time. It is anticipated that future discovery and independent investigation could supply additional facts or information, add meaning to known facts, may establish entirely new factual conclusions and contentions, all of which may lead to substantial additions to, changes in and variations from the responses set forth herein. Accordingly, the answers herein are made without prejudice to the right of Simplywell to provide evidence at time of trial.

2. Simplywell objects to each Interrogatory to the extent that it purports to require the disclosure of information which is protected by the attorney/client privilege, work product doctrine, proprietary or trade secret privileges, or any other privilege, immunity or exemption. No documents for which such privileges are asserted will be produced.

3. Simplywell objects to the extent that these Interrogatories seek to require to produce documents within the possession, custody or control of third parties.

4. Simplywell objects to the Interrogatories which seek confidential, proprietary, commercial or financial information without the entry, by the Court, of an appropriate Protective Order.

5. Simplywell objects to the Definitions and Instructions contained within the Interrogatories to the extent that they purport to impose obligations and duties on Simplywell beyond those under the Federal Rules of Civil Procedure.

6. Simplywell specifically incorporates each of the foregoing General Objections into each of the answers to Elgo's Interrogatories and, when appropriate, will state additional specific

objections to each such discovery request. The answers of Simplywell to Elgo's discovery are made subject to and without waiving these general and specific objections of Simplywell.

APPLICANT'S ANSWERS TO INTERROGATORIES

Interrogatory No. 1. Identify all state and federal registrations, applications for registration, and uses by Applicant of Applicant's Mark, and for each such registration, application and use, identify all documents relating thereto.

ANSWER:

Applicant states that it is the owner of pending federal trademark application number 77/090694 for the mark SIMPLYQUIT. Applicant's SIMPLYQUIT mark is used to offer counseling services in the field of smoking cessation. Applicant refers Opposer to Applicant's trademark application, specimen of use and amendment to allege use.

Interrogatory No. 2. Describe in detail the nature of Applicant's use of Applicant's Mark, including the date on which Applicant first engaged in each such use.

ANSWER:

Applicant states that its mark is used in connection with offering counseling in the field of smoking cessation to employees of Applicant's corporate customers.

Interrogatory No. 3. Identify and describe each of the goods and/or services on which Applicant intends to use or has used Applicant's Mark, or variations thereof.

ANSWER:

Counseling services in the field of smoking cessation.

Interrogatory No. 4. Identify all documents and set forth with specificity all facts regarding the selection by Applicant of Applicant's Mark including the circumstances and method by which Applicant adopted Applicant's Mark.

ANSWER:

Applicant objects to this request to the extent that it purports to require the disclosure of information that is protected by the attorney/client privilege and/or work product doctrine. Without waiving said objection, Applicant states that Applicant's Mark was selected as it is consistent with Applicant's family of "SIMPLY" derivative marks.

Interrogatory No. 5. Identify the person or persons most knowledgeable about Applicant's sales, advertising and sales promotion, adoption and use, licensing, and assignment or other transfer of rights with respect to Applicant's Mark.

ANSWER:

Michael Demman

Interrogatory No. 6. Identify all persons who were involved in, or participated in any way with, the decision to adopt, register and/or use Applicant's Mark, and for each such person, state his/her title and the role he/she played to adopt, register and/or use Applicant's Mark.

ANSWER:

Michael Demman

Interrogatory No. 7. State whether any searches or investigations were conducted by Applicant, its attorneys, or any persons on its behalf to determine whether Applicant's Mark was in use by another, and whether any searches or investigations were conducted to determine whether Applicant's Mark was available for use and/or registration, and if so, identify each such search or investigation including the date such search was performed and the marks located in such searches or investigations.

ANSWER:

Applicant objects to this request to the extent that it purports to require the disclosure of information that is protected by the attorney/client privilege and/or work product doctrine. Without waiving and subject to said objection, Applicant states that a trademark search was conducted in connection with Applicant's adoption and application for registration of Applicant's Mark. The trademark search disclosed Opposer's abandoned registration.

Interrogatory No. 8. Identify all manufacturers or intended manufacturers of goods, and all promoters or users or intended promoters or users of services bearing Applicant's Mark.

ANSWER:

Applicant states that the intended users of Applicant's services are individual employees of companies that are subscribers to SimplyWell's Integrated Health Solutions. Applicant does not offer its services directly to the general public; rather, services are offered through member employer subscribers.

Interrogatory No. 9. Identify all documents supporting the date on which the mark was first used, if use has commenced for each of the services identified in Applicant's application Serial No. 77/090694.

ANSWER:

Applicant refers Opposer to its amendment to allege use filed with the U.S.P.T.O. on February 7, 2007.

Interrogatory No. 10. Identify all documents and set forth with specificity the substance of each communication whether oral or written received by Applicant which suggests, implies or supports an inference that any of the products or services of Applicant sold under Applicant's Mark is a product or service of Opposer, or is affiliated, connected and/or associated with Opposer, or inquiries as to whether there is or may be an affiliation, connection and/or association between Applicant and Opposer, and identify any responses by Applicant to each such communication.

ANSWER:

None.

Interrogatory No. 11. Identify each different display, label, sign, wrapper, container, package, advertisement, brochure, promotional or informational material or the like known to Applicant which contains or bears Applicant's Mark or any variation thereof which is intended to be used or has been used or disseminated by Applicant at any time, and identify the date(s) and place(s) where such displays, labels, advertising, etc., bearing Applicant's marks have been so used and any such planned uses.

ANSWER:

Applicant objects to this Interrogatory in that it is overly broad, unduly burdensome and not reasonable calculated to lead to the discovery of admissible evidence. Without waiving, and subject to the foregoing, Applicant states that it maintains promotional materials that describe the SIMPLYQUIT eight step smoking cessation program.

Interrogatory No. 12. Identify with specificity the channels of trade in which Applicant's Mark is used and/or in which goods or services bearing Applicant's Mark are sold, including the geographic area by state, territory or possession in which Applicant's Mark is used and/or sold, the manner in which the goods or services reach the ultimate consumer, the geographical reach of each such channel, and the approximate percentage of total sales of goods and/or services through each such channel, and identify documents sufficient to support your response.

ANSWER:

Applicant's services are offered to corporations in connection with SimplyWell's Integrated Health Solutions. Applicant's services are marketed directly through sales representatives or account managers on a nationwide basis.

Interrogatory No. 13. Identify with specificity the marketing methods used in the advertising and/or sale of goods and/or services by or for Applicant under Applicant's Mark, including the

names of television stations, radio stations, Internet web sites, newspapers, magazines, trade journals or periodicals, and/or retail establishments in which Applicant has advertised and intends to advertise its goods and/or services under Applicant's Mark, and identify documents sufficient to support your response.

ANSWER:

Applicant's services are marketed through Applicant's sales representatives and account managers directly to corporate prospects. Applicant's SIMPLYQUIT smoking cessation program is offered as a party of SimplyWell's Integrated Health Solutions.

Interrogatory No. 14. Identify with specificity the dates and numbers of instances that Applicant has used Applicant's Mark for smoking cessation goods and/or services, and whether such uses have been related to interactions with individual consumers or with corporate clients or purchasers of Applicant's goods and/or services.

ANSWER:

Applicant objects to this Interrogatory in that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving, and subject to the foregoing objections, Applicant states that Applicant has been offering its corporate customers the SIMPLYQUIT smoking cessation program in connection with SimplyWell's Integrated Health Solutions continuously since as early as September 2006. Applicant offers its SIMPLYQUIT smoking cessation program to employees of SimplyWell corporate customers.

DATED this 9th day of April, 2008.

Respectfully submitted,


SIMPLYWELL, LLC, Applicant

By: _____

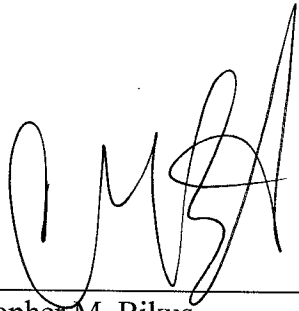
Christopher M. Bikus
McGRATH, NORTH, MULLIN & KRATZ, PC LLO
Suite 3700 First National Tower
1601 Dodge Street
Omaha, NE 68102
(402)341-3070
(402)341-0216 (fax)

ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S ANSWERS TO OPPOSER'S FIRST SET OF INTERROGATORIES** was served on this 4th day of April, 2008, by sending the same, via first class mail, postage prepaid to:

Cynthia R. Moore
Moore Patents
794 Los Robles Avenue
Palo Alto, CA 94306
Tel: (650) 565-8185



Christopher M. Bikus

Exhibit 11

to

Motion for Summary Judgment

Trademark Opposition No. 91179090

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/090694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

OPPOSITION NO.: 91179090

OPPOSER

vs.

SIMPLYWELL, LLC,

APPLICANT

OPPOSER'S ANSWERS TO APPLICANT'S
FIRST SET OF INTERROGATORIES

TO: SimplyWell, LLC by and through their attorney Christopher M. Bikus, McGRATH
NORTH MULLIN & KRATZ, PC LLO, Suite 3700, First National Tower, 1601 Dodge Street
Omaha, Nebraska 68102

COMES NOW Elgo, Inc. ("Elgo"), and pursuant to the provisions of Rule 33 of the Federal
Rules of Civil Procedure and Trademark Rule 2.120, responds to SimplyWell, LLC's
("SimplyWell") First Set of Interrogatories as follows.

GENERAL OBJECTIONS

1. Elgo has not yet completed its investigation of the facts in this matter, has not completed discovery, and has not completed trial preparation. Accordingly, Elgo is providing its present responses in a good faith effort to comply with SimplyWell's Interrogatories. Further investigation, discovery and trial preparation may lead to the discovery of additional information and facts. The following responses are made upon the basis of information available to Elgo at this time. It is anticipated that future discovery and independent investigation could supply additional facts or information, add meaning to known facts, may establish entirely new factual conclusions and contentions, all of which may lead to substantial additions to, changes in, and variations from the response set forth herein. Accordingly, the answers made herein are without prejudice to the right of Elgo to provide evidence at time of trial.

2. Elgo objects to each Interrogatory to the extent that it purports to require the disclosure of information which is protected by the attorney-client privilege, work product doctrine, proprietary or trade secret privileges, or any other privilege, immunity or exemption. No documents for which such privileges are asserted will be produced.

3. Elgo objects to the extent that these Interrogatories seek to require to produce documents within the possession, custody or control of third parties.

4. Elgo objects to the Interrogatories which seek confidential, proprietary, commercial or financial information without the entry by the Court of an appropriate Protective Order.

5. Elgo objects to the Definitions and Instructions contained within the Interrogatories to the extent that they purport to impose obligations and duties on Elgo beyond those under the Federal Rules of Civil Procedure.

6. Elgo objects under 37 C.F.R. § 2.120(d)(1) to the excessive number of interrogatories, which including subparts, exceed 75 in number. Nevertheless, Opposer has attempted to provide good faith answers where it was not excessively burdensome to do so.

7. Elgo specifically incorporates each of the foregoing General Objections into each of the answers to SimplyWell's Interrogatories and when appropriate, will state additional specific objections to each such discovery request. The answers of Elgo to SimplyWell's discovery are made subject to and without waiving these general and specific objections of Elgo.

OPPOSER'S ANSWERS TO INTERROGATORIES

Interrogatory No. 1: Identify all persons who you believe have knowledge of facts pertaining to the subject matter of this opposition, including within your answer a brief description of the facts for which each person has knowledge.

Answer:

Sam Gold (all relevant facts)
Ely Gold (inventor on patented simulated cigarette, trademark applicant)

Interrogatory No. 2: Please identify each person whom Opposer expects to call as an expert witness in this proceeding, and state all of the following: (a) The subject matter on which the expert is expected to testify; (b) The substance of the facts and opinions to which the expert is expected to testify; and (c) A summary of the grounds for each opinion.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 3: For each expert identified in Opposer's answer to No. 2 above: (a) Please provide a complete statement of all opinions to be expressed and the basis and reasons therefore; (b) Please list all of the data or other information considered by the expert witness in forming the opinion; (c) Please list all exhibits to be used as a summary of or in support for the opinion; (d) Please describe the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten (10) years; (e) Please describe the compensation arrangement with the expert; and (f) Please describe all court cases or administrative proceedings in which the witness has testified as an expert at trial or by deposition within the preceding ten (10) years, providing for each case or proceeding all of the following: (i) the names of the parties involved in the proceeding; (ii) the proceeding number; (iii) Opposer's status therein; (iv) any trademark or service marks involved; (v) the type of proceeding involved; (vi) the name of the Court or agency in which the proceeding was filed; (vii) the date of the filing and file number; (viii) the ultimate disposition of the proceedings; and (ix) each document relating to such proceeding.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, attorney-client privileged information and/or attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 4: Identify each non-expert witness that Opposer expects to testify in this proceeding, the subject matter on which such witness is expected to testify, and the substance of the facts to which such witness is expected to testify.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 5: With respect to Opposer's Mark, identify the person or persons most knowledgeable about Opposer's sales, advertising, and sales promotion, adoption and use, licensing, and/or assignment or other transfer of rights to Opposer's Mark.

Answer:

Sam Gold

Interrogatory No. 6: Identify all state and federal registrations, applications for registration, and uses by Opposer of Opposer's Mark and for each such registration, application, and use, identify all documents relating thereto.

Answer:

U.S. Trademark Application No. 78/085,086 for the mark SIMPLYQUIT™. Opposer's SIMPLYQUIT mark is used to sell products related to smoking cessation. Opposer refers Applicant to Opposer's U.S. Trademark Application and application file and to Opposer's website <http://www.simplyquit.com>.

Interrogatory No. 7: Describe in detail the nature of Opposer's business or businesses, including the date on which Opposer first engaged in such business.

Answer:

Opposer's business sells SIMPLYQUIT simulated cigarettes nationwide (and internationally) as an aid to smoking cessation and provides the SIMPLYQUIT Step by Step Stop Smoking Guide. The business was incorporated August 25, 2000, received a seller's permit on January 1, 2001, and completed the first sale on September 21, 2001.

Interrogatory No. 8: Identify and describe each of the goods and/or services on which Opposer intends to use, currently uses, or has used Opposer's Mark or any variation thereof.

Answer:

Opposer sells SIMPLYQUIT simulated cigarettes nationwide (and internationally) as an aid to smoking cessation, and provides the SIMPLYQUIT Step by Step Stop Smoking Guide.

Interrogatory No. 9: For each of the goods or services identified in answer to Interrogatory No. 8, identify all of the following: The number of units and dollar amount of the annual sales of such goods and services; The dollar amount of annual advertising expenditure on such goods or services; The individual medium in which such advertising took place; The dollar amount of advertising through each such medium; and (e) Documents sufficient to support your answer to this Interrogatory.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 10: Identify all documents and set forth with specificity all facts regarding the selection by Opposer of Opposer's Mark including, without limitation, the circumstances and method by which Opposer adopted Opposer's Mark.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 11: Identify all persons who were involved in, or participated in any way with, the decision to adopt, register and/or use Opposer's Mark, and for each such person, state his/her title and the role he/she played to adopt, register and/or use Opposer's Mark.

Answer:

Ely Gold, inventor of product, chose the mark and filed the trademark application. Sam Gold, owner of Elgo, Inc., manages Elgo, Inc. which manufactures and sells products under the SIMPLYQUIT trademark.

Interrogatory No. 12: State whether any searches or investigations were conducted by Opposer, its attorneys, or any persons on its behalf to determine whether Opposer's Mark was available for use and/or registration, and if so, identify each such search or investigation including the date such search or investigation was performed and the trademarks located in such search or investigation.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 13: Identify all manufacturers or intended manufacturers of goods, and all promoters or intended promoters of any goods or services bearing Opposer's Mark.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 14: For each of the goods and/or services identified in Opposer's application, Application Serial No. 78/085,086, identify all documents supporting the date in which Opposer's Mark was first used.

Answer:

Opposer refers Applicant to the Opposer's Trademark Application filed as "in use" under Section 1(a).

Interrogatory No. 15: Identify all documents and set forth with specificity all facts with respect to any instance where a person or entity has been confused, mistaken, and/or deceived as to whether any goods or services advertised or sold under Opposer's Mark are those of Applicant, or are connected or associated with Applicant, and for each such incident provide the date of such incident, the identity of the person or entity, and a detailed description of the circumstances of such confusion, mistake and/or deception.

Answer:

Documents associated with this Opposition.

Interrogatory No. 16: Identify a representative sample of each different sign, display, point-of-sale display, label, hand tag, wrapper, container, package, advertisement, brochure, promotional material, and the like, known to Opposer which contains or bears Opposer's Mark or any variation thereof and which is intended to be used, is currently in use, or has been used or disseminated by Opposer within the last (5) years.

Answer:

Opposer objects to this Interrogatory as unduly burdensome. Without waiving said objection, Opposer refers Applicant to sample internet, television, and radio advertising material posted at Opposer's website <http://www.simplyquit.com> as well as the record in his Trademark Application file at the USPTO.

Interrogatory No. 17: Identify each person employed by Opposer, or each outside agency or agent retained by Opposer, who has been or is responsible for the following activity with respect to any goods sold and/or services offered by and/or intended to be sold, offered, or promoted by under Opposer's Mark:

- (a) Marketing;
- (b) Advertising and promotion; and
- (c) Bookkeeping and accounting.

Answer:

Opposer objects to this Interrogatory to the extent that it requests confidential company information. Without waiving said objection, Opposer states that Sam Gold has overall responsibility and supervises other employees and outside contractors.

Interrogatory No. 18: State whether Opposer ever licensed or permitted or had negotiations to license or permit, or otherwise granted rights to third parties to use Opposer's Mark. If so, identify the following: (a) The party or parties who have received or sought such license or permission or other right; and (b) The nature and extent of any such license or permit of use or right, given or negotiated, and identify and describe all documents compromising [*sic*] or containing any such license, permission, or other right, or any agreement in respect to Opposer's Mark.

Answer:

Opposer has never licensed or permitted rights to third parties to use Opposer's Mark.

Interrogatory No. 19: State in detail the channels of trade in which Opposer's Mark is used, including all of the following: (a) The geographic area by state, territory, or possession to which each such channel reaches or extends; (b) The manner in which the goods or services reach the ultimate consumer in each such channel; (c) The approximate percentage of sales of goods and/or services sold in each such channel out of the total sales of goods and/or services sold under Opposer's Mark; and (d) Documents sufficient to support your answer to this Interrogatory.

Answer:

Opposer objects to this Interrogatory as seeking confidential business information. Without waiving said objection, Opposer states that Opposer's products are sold nationwide and internationally via internet, mail, and telephone orders. Products are shipped by various common carriers.

Interrogatory No. 20: Identify with specificity the marketing methods used in the advertising and/or sale of the goods and/or services by or for Opposer under Opposer's Mark, but not limited to, the names of television stations, radio stations, Internet Web sites, newspapers, magazines, trade journals, or periodicals, and/or retail establishments in which Opposer has advertised and intends to advertise its goods and/or services under Opposer's Mark, and identify documents sufficient to support your answer to this Interrogatory.

Answer:

Opposer objects to this Interrogatory as seeking confidential business information. Without waiving said objection, Opposer states that marketing has included the website <http://www.simplyquit.com>, various national media companies, including Stardust Media LLC, Central Point Media, TV Sales Pros LLC, PSST; print media including *Globe*, *National Enquirer*, *Star*, *Outdoor Life*, *Prevention*, *Inventor's Digest*, *Golf*, *Entertainment Today*, *Times Mirror*, *Mystery*, *Autoworld News*, *PennySaver*, *Acorn*, *Alaska Bush Shopper*; radio stations, including KQQU (Omaha Nebraska), KNIK, Talk Radio; and TV channels including Comedy Central, Family Net, Great American Country, WBIH TV, WYBE-LP, WCTV, KBTB, UATV, KFWD, WKAG, WYB33, KETK, CNTV, KMIR TV, TVHH.

Interrogatory No. 21: Identify the ordinary purchaser of the goods or services sold and intended to be sold under Opposer's Mark, including, but not limited to, the level of care exercised by such an ordinary purchaser in purchasing the goods and/or services sold under Opposer's Mark.

Answer:

Individuals seeking assistance with efforts to quit smoking, as well as health care personnel, including physicians, pharmacists, nurses and smoking cessation counselors.

Interrogatory No. 22: Identify all documents relating to and set forth with specificity all facts regarding each and every instance where Opposer has notified any third party that any trademark or service mark used by that person or entity infringe Opposer's Mark, and for each such instance

provide a detailed description of any action taken thereafter.

Answer:

Documents related to the instant Trademark Opposition.

Interrogatory No. 23: State whether Opposer has been a party to any litigation or administrative proceeding, other than the present opposition, involving Opposer's Mark. For all such litigation or administrative proceedings, provide all of the following: (a) The names of the parties involved in the proceeding; (b) The proceeding number; (c) Opposer's status therein; (d) The mark or marks involved; (e) The type of proceeding involved; (f) The name of the Court or agency in which the proceeding was filed; (g) The date of the filing and file number; (h) The ultimate disposition of the proceedings; and (i) Each document relating to such proceeding.

Answer:

There are none.

Interrogatory No. 24: For purposes of establishing priority of use, identify the earliest date upon which Opposer intends to rely in this proceeding with respect to its use of Opposer's Mark and identify all documents supporting that date of use.

Answer:

September 21, 2001. See Opposer's Trademark Application filed under Section 1(a).

Interrogatory No. 25: Identify any period of non-use of Opposer's Mark.

Answer:

There is none.

Interrogatory No. 26: Describe in detail the length of any period of non-use of Opposer's Mark identified in response to Interrogatory No. 25, and the circumstances and facts that led to such period of non-use.

Answer:

There is none.

Interrogatory No. 27: Describe in detail all facts and circumstances that led to the abandonment of U.S. Trademark Application Serial No. 78/085,06 [sic].

Answer:

Opposer refers Applicant to the file for U.S. Trademark Application Serial No. 78/085,086, wherein all circumstances are described and documented in detail. See especially, Opposer's Petition to Revive (response to Notice of Abandonment) dated August 26, 2002.

Interrogatory No. 28: Identify each person who participated in or supplied information used in answering any of the above Interrogatories. For each such person, state the number of the Interrogatory answer(s) with respect to which that person participated in or supplied information.

Answer:

Sam Gold (all Interrogatories) together with counsel.

Interrogatory No. 29: Identify all state and federal registrations, applications for registration, and uses by Opposer of any of Opposer's Marks, and for each such registration, application, and use, identify all documents relating thereto.

Answer:

Opposer object to this Interrogatory to the extent that it purports to require the disclosure of information that is protected by the attorney-client privilege, work product doctrine, and confidential business documents, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 30: Identify all third-party state and federal registrations, applications for registration, and uses known to Opposer of any mark which incorporates the terms SIMPLYWELL.

Answer:

Opposer is not aware of any third party use of the Mark SIMPLYWELL.

Dated this 14th day of April, 2008

Respectfully submitted,

ELGO, INC., Opposer

By: /Cynthia R. Moore/
Cynthia R. Moore
794 Los Robles Ave.
Palo Alto, CA 94306
(650) 565-8185
(650) 493-1993

ATTORNEY FOR OPPOSER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing “Answers to Interrogatories” was served on Christopher Bikus, the attorney for Applicant SimplyWell, LLC, by first class mail postage prepaid and via email this 14^h day of April 2008, addressed as follows:

McGRATH NORTH MULLIN & KRATZ, PC LLO
Suite 3700, First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Attention: Christopher M. Bikus, Esq.

/Cynthia R. Moore/
Cynthia R. Moore
Attorney for Opposer